THE OFFICE and DUTY OF EXECUTORS;

Or, A TREATISE directing TESTATORS to form, and EXECUTORS to perform their Wills and Teſtaments according to Law.

What a Man may give or diſpoſe of by his Will; of Revocations and new Publications of Wills.

Of the State of Things upon the Teſtator's Death; what may be done by an Executor, &c.

Of proving Wills, and of the Fees payable for the Probates.

What Things ſhall come to Executors by or after the Teſtator's Death.

Caſes between Heir and Executor; and of Suits by or againſt them; and of the Method of Payment of the Teſtator's Debts.

Of *Devaſtavit* or Waſting; and of an executor in his own wrong.

Of married Women and Infant Executors; of Legacies; of Executors of Executors; of Adminiſtrators.

Originally compiled by that Approved and Judicious AUTHOR

THOMAS WENTWORTH of *Lincoln's Inn*, Eſq;

To which is added,

The Supplement of H. CURSON, Gent. many Hundred References, by a Barriſter of *Grey's Inn*; and ſince reviſed and brought down to the preſent Time,

By GEO. WILSON, Serjeant at Law.

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M DCC LXXIV.

I Do allow the reprinting of the Office of Executors.

FRA. NORTH.

PREFACE.

I Cannot well ſee or comprehend how any one legal part or theme may be more uſeful to and for the generality of men, and conſequently more generally expedient and wiſhed for, than the Office of Executors. For who almoſt is there, who either is not, or may not be an executor or adminiſtrator; or at leaſt hath not, or may not have to do with them, either to receive from them, or to pay to them debts or legacies? Or who is there above *Forma Pauperis*, that may not be a teſtator or will-maker, to the guidance of whom, even in the choice of his executors and contrivance of his will, it can-

not be but material to know the office and duty, the right and intereſt, the power and authority of executors? yea of each one executor, where there be divers; yea to know who may be made an executor, who not; who can make one, who not; how he may be faſhioned generally or ſpecially; what ſhall come to him, that cannot be given from him: yea, what goods or chattels ſhall go from him? Beſides the knowledge for thoſe others neceſſary, of the ſafeſt wards or locks for executors, their *Scylla* and *Charybdis*, and the beſt advantage for creditors, &c. towards or againſt them. To me, conſidering what part of law were moſt behoveful to be communicated to all willing readers, none appeared which could challenge of *this* the precedence, and therefore I give it the firſt and leading place. Thus my own thoughts.

But

But how far this diſcourſe may be profitable to any, and how many, *aliorum ſit judicium.* How many know no more of theſe, than of the way of a ſhip upon the ſea?

Theſe are not intended for the learned of our profeſſion who have drawn, or can draw, out of the ſame fountain which I did, and ſo need not my help, but for their ſakes who are not profeſſors of the law; yet ſo, as if any young ſtudents may in any part receive fruit by my labour, I ſhall not grudge or repine at their ſo doing. *Bonum, quo communius, eo melius.*

What Mr. *Wentworth* heretofore publiſhed concerning the Office and Duty of Executors, being known by experience, and many years approbation, to ſtand upon

the ſolid and laſting foundation of the law; I conceived it more proper and advantageous for publick good, to ſupply what is now neceſſary to be added thereunto, by reaſon of the alterations occaſioned by time, acts of parliament, and otherwiſe, than wholly to raiſe a new ſtructure; which although with the like materials, and in the like form, yet, for want of the like time for trial, could not expect the like approbation: Therefore, as deſired, I was willing to compile a Supplement to the Office and Duty of Executors, containing what I have collected from the great body of the common and ſtatute-law of the kingdom, and which hath been omitted, or not compriſed in former impreſſions; deducing the ſame from the original definitions, and rendering the whole compleat, and in all its parts conformable to the preſent time,

time, and conſonant to the laws now in force: with references to the Books and Statutes at Large, authorizing and approving the ſame, in ſuch a brief and regular manner as may be moſt ready and proper for the uſe and ſatisfaction of the judicious, inſtruction of the ſtudious, and direction of thoſe it doth or may concern.

In this Edition notice is taken, in the proper places, of ſuch acts of parliament and reſolutions of the courts of juſtice, as have altered the law on this ſubject, ſince the above authors wrote, and numerous references added.

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THE

THE OFFICE OF AN EXECUTOR.

The INTRODUCTION.

THE things conſiderable touching executors may all, in effect, be reduced to theſe three heads, *viz.*

Their *Being.*
Their *Having.*
Their *Doing.*

By the firſt, I intend their creation or conſtitution, with the incidents thereto. By the ſecond, their intereſt, fruition or poſſeſſion. By the third, their managing and execution of their office. This laſt was and is the thing principally in my intention, and the chief aim of this diſcourſe; but neceſſarily it muſt have ſome *ingredients*, ſome *concomitants*, and ſome *conſequents:* as he that travelleth from *London* to *York* to ſpeak with *J. S.* muſt needs paſs by and through other towns and villages, and ſpeak with divers other perſons in his journey and return. To come firſt to the firſt, therein we will conſider theſe ſix things.

CHAP. I.

Of the relation between a will and an executor,

1. *Whether an executor and a will be ſuch relatives, that one cannot be without the other; and therein of the ſeveral kinds of wills.* 2. *How and in what words an executor may be made and created.* 3. *How he may be in ſpecial manner, different from the general, faſhioned, limited, or qualified.* 4. *Who may make, or be made an executor, who not.* 5. *What one may give or bequeath by will, what not.* 6. *How a will or executor once made, may be unmade, and what ſhall amount thereto,* viz. *a revocation total or partial; what to new publication.*

AS to the firſt; the very name of *executor* purporteth in general one to *execute* ſomewhat, or to whom the *execution* of ſomewhat is committed or recommended. In one particular thereof an executor of a will muſt needs be ſuch a one to whom the execution and preformance of another man's will after his death is commended or committed; or who is conſtituted or authorized by the will-maker to do him that friendly office. Hence it followeth neceſſarily, that a will is the only bed where an executor can be begotten or conceived; for where no will is, there can be no executor: and this is ſo conſpicuous, and evident to every low capacity, that it needs no proof or illuſtration. On the other ſide, though much may be written in the name of a will, many legacies bequeathed, and many things appointed to

Executor, what.

Vid. Sup. p 1. 2, 4.

to be done, * yet if no executor be named, there is no will: for theſe two be ſo relative and reciprocal, as that one cannot be without the other; if no will, no executor; if no executor no will. Yet here are two cautions to be afixed: 1. That a man's mind, will and intent touching the diſpoſition of his goods being declared, although for want of naming an executor he die inteſtate, ſo as adminiſtration is to be committed; yet for that here is not only an inchoation or inception of a teſtament, but ſo far a progreſſion therein as *teſtatio mentis*, that is, the manifeſtation of the mind of the party deceaſed, and owner of goods; therefore this mind and intention of the inteſtate being notified and made known to the judge, who is to commit adminiſtration, is uſually annexed (as I take it) to the letters of adminiſtration; and meet ſo to be, for a direction for and to the adminiſtrator, as well as to the will fully and perfectly made, but refuſed to be proved by the executor, which is uſual. Another caution is, where a man ſeiſed of Land in fee-ſimple diſpoſeth the ſame, or part thereof, by his will in writing, this ſtandeth good for the whole or part, according to the difference of the tenure, altho' no executor be named: ſo as the party dieth inteſtate, and adminiſtration is to be committed, as touching his goods; and yet hath a will, as touching his lands. This may ſeem ſtrange: but the reaſon thereof is an act of parliament, enabling to diſpoſe of land by will in writing; and for that land is not properly teſtamentary; neither hath the executor (if any be) any thing to do or

* Plow. Com. 185. Swinb. 7. 238. Pick Finch 167.

† Teſtamentum, quaſi teſtatio mentis.

What regard is to be paid to a man's declaration of his will where no executor is named.

Will of lands good by ſtatute.

32 H. 8. c. 1.

Noy Max. 4.

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* *Teſtament, as it were the witneſſing of the mind.*

intermeddle therewith: and therefore is the making or not making of an executor, nothing pertinent to the validity or invalidity of this deviſe or diſpoſition of lands by will. So as though where there is not *teſtatio mentis*, there is not *teſtamentum*; yet may there be the firſt without the latter. Having now ſeen that bequeſts of legacies, without making of executors, doth not amount to a will; let us now conſider whether the ſole making of executors in the name of a will, without giving any legacy, or appointing any thing to be done by executors, whether, I ſay, this be or amount unto a will or not; ſince here upon the matter nothing is willed, and conſequently nothing reſts to be executed by the executors, whoſe office is, as hath been ſaid, to execute the mind, will, and intent of their teſtator; and, *Ubi non eſt teſtatio mentis, non eſt teſtamentum*, ſay the canoniſts. For anſwer hereunto, confeſſing that indeed to be the office of an executor, I yet conceive confidently, that in the caſe above put there is a good will, and as a will it is to be proved, and approved for theſe reaſons: Firſt, for that the main and principal part of an executor's office, and that which concerns the ſoul of a teſtator (as our books ſpeak) is the payment of his debts: now who knows not that the very making of an executor is the conſtituting of ſuch a perſon who is to pay all debts? and for that cauſe and end is principally to have and enjoy all the goods and chattels of the teſtator and all ſums of money to him owing. So as the naming of *A.* and *B.* executors, is by implication a gift or donation unto them of all the goods and chattels, credits and perſonal eſtate of the teſtator, and the laying upon them an obligation to pay all

The making an executor without more, amounts to a will.

Sum. Silv. fol. 32. b.

And why it does ſo.

What it implies.

all his debts, and making them ſubject to every man's action for the ſame. And if the law ſpeak thus much, ſince *quod neceſſario ſubintelligitur non deeſt*, what need then the party expreſs it in his will? If he had willed more than this, as to have given this or that in way of legacy, it had been needful for him ſo to have ſet down in his will; but there is no meer neceſſity that every man ſhould give legacies in his will; the eſtates of many will not do more than pay their debts, nor oftentimes do ſo much; ſo as if they ſhould give any legacies, it muſt be a dead and a void gift. And ſuppoſe a man hath much more, and intendeth all to his wife, brother or ſiſter, or other friend, his debts being by ſuch perſons paid; ſince the very making of the party executor without any more amounteth to thus much, and effecteth this, what needeth then more words? *Fruſtra fit per plura quod fieri poteſt per pauciora*; as we often ſpeak touching legal paſſages. It is needleſs to write four lines where two are ſufficient. Nor is *teſtatio mentis* here wanting, ſince the teſtator hath made known who ſhall have the adminiſtration of his goods for payment of his debts: and it is to be preſumed he had no more ſpecial will, ſince he did not declare more, and left his executors farther to have and to do *prout lex poſtulat*. And who can ſay here is nothing to execute? Is the ſuing for and collecting of debts due to the teſtator, and paying of debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum neceſſarium*. Beſides, the making of an executor is a deſignment of a perſon to be the teſtator's aſſignee, to whom and by whom divers things may be feaſible by vir-

tue of covenants, bonds or other aſſurances; as after, where we come to ſhew how the executor repreſents the perſon of the teſtator, will appear: alſo of one who, as our books often ſpeak, is to diſpoſe the teſtator's goods for the beſt advantage of his ſoul; but inſtead of that, (ſince as the tree falleth, ſo will it lie or reſt) I will ſay, as is moſt for the honour and reputation of the teſtator.

Of the kinds of wills.

Teſtamentum eſt duplex.
1. In ſcriptis,
2 Nuncupativum
Seu ſine ſcriptis
Co. Lit. 111.
Vide poſt Sup. P. 7.
4 Hen. 6. 10.
If it be written, and brought to and approved by the teſtator in his life, it is a will in writing.
14 H. 6. 5.
Vide 5. H. 5.

NOW wills are of two kinds, or may be two ways made, *viz.* either by writing; or nuncupative, that is, by words not put in writing during the teſtator's life; for after the teſtator's death this verbal will muſt be reduced to writing, and have the ſeal of the ordinary or judge ſpiritual thereto affixed: and then it is as effectual and of as good validity, as if it had been in writing in the teſtator's life-time; and ſo doth the common law allow and approve thereof.

1 M. 15. and 16 Eliz.

But I adviſe all to make wills by writing, and not to leave them to the doubtful fidelity or ſlippery memory of witneſſes. For, as of leaſes parol hath been ſaid, that they be leaſes perjured or of perjury; ſo of wills parol may be feared. Beſides, many times a man doth ſpeak and declare this or that part of his will, which his wife, child or friend diſſwading, he letteth that purpoſe and part of his will to fall, and departs from it; yet witneſſes, wiſhing it to ſtand, will perhaps affirm it as part of the will.

will. As for a will-gift, and diſpoſition of land of inheritance, if it be not fully written before the death of the teſtator, or done ſo far (at leaſt) as concerns the diſpoſition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and chattels it may. Yet if it be written before the death of the teſtator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for land, as the caſe reſolved in King *Edward* VI. his time was, but alſo for goods and chattels, ſo as there be an executor named. But whether ſhall we ſay this is a will nuncupative, or in writing? And ſurely I think that this is a will in writing, and not only verbal, tho' it want ſubſcribing; for we know that many cannot write their names, but only marks, and what is that? nay, ſuppoſe one wants Hands, and cannot write ſo much as his name; yet doubtleſs this man may make a will in writing, it being written by his direction, as his will which he dictated: nor is the ſubſcribing of the name of the maker any eſſential part of a deed, and leſs of a will, which needs not ſealing, as a deed doth. Now put we the caſe on the other ſide, that many bequeſts or legacies be named in a will, and many things expreſſed to be done, and no executor is named in the writing, only by word of mouth *A.* and *B.* be named executors: this I think confidently is no will in writing, but nuncupative only; for that one eſſential part of the will, *viz.* making of executors is wanting in the writing. Nay, the appointing of him executor who is named in a note left with *A. B.* is no ſufficient making of an executor, ſaith the

The Statute of 32 H. 8. is, that every perſon, &c. may by will in writing, &c.

6 Ed. 6. Dyer 32.

It is a good will of lands within the ſaid act, though not ſubſcribed by deviſor. 1 Sid. 315, 362. But vide 29 Car. 2. c. 3.

The number required by the ſtatute of frauds to ſuch will is but three.
29 Car. 2. c. 3.
Tit. de Teſt. Sum. Silv. f. 443. b.

Summiſt. And of ſuch nuncupative wills Mr. *Perkins* reaſonably ſaith, that it properly hath place when one, ſuddenly taken with ſickneſs violent, dares not ſtay the writing of his will, for fear of prevention by death; and therefore prays his curate and others to witneſs what his will is. To this will not written there muſt be ſeven witneſſes, and ſuch as come not by chance, but are eſpecially called for that purpoſe, ſaith the *Summiſt.*

It he ſurvive and live a long time, not cauſing it to be writ or atteſted by witneſſes, methinks it ſhould not ſtand as his will Id. ſupra fol. 444. b.

What ſhall amount to a making one executor, or what words are requiſite thereunto.

See Cro. El. 43.

HAVING before made it to appear, that the being of an executor is an eſſential part of a will, and ſo *de eſſe*, and not *de bene eſſe* only, of a will and teſtament: let us now ſee, firſt by what words an executor may be made: ſecondly, *de modo*, in what manner it may be done, how the power and authority of executors may be limited and divided. As to the firſt, though one do expreſly by will name or appoint any to be executor; yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an executor, it amounteth to as much as the ordaining or conſtituting of him or them to be executors: as if he declare by his will that *A. B.* ſhall have his goods after his death to pay his debts, and otherwiſe to diſpoſe at his pleaſure, or to that effect; by this is *A. B.* made executor, as was conceived by the judges in the late Queen's time. And long before that it was held, that if one do will only

A man may be executor, though not expreſly named ſo, by implication.
If A. B. be made executor and to him and D. ſome goods are deviſed to be diſpoſed for his ſoul, D. is by this an executor for thoſe.
39 H. 6. Dyer 90. M. 15 & 16 El. 21 H. 6, 6, 7,

that *A. B.* ſhall have the adminiſtration of goods, he is thereby made executor; yea, in the ſaid late Queen's time, one giving divers legacies, and then appointing that his debts and legacies being paid, his wife ſhould have the reſidue of his goods, ſo that ſhe put in ſecurity for the performance of his will; by this, without more, was ſhe an executor, as was held by three juſtices, *viz. Manwood*, *Harper* and *Mounſon*, in the lord *Dyer's* abſence. And ſo alſo where an infant was made executor, and *A.* and *B.* overſeers, with this condition, that they ſhould have the rule and diſpoſition of his goods, and payment and receipt of debts unto the full age of the infant; by this were they held to be executors in the mean time. And if *A.* be made executor, and the teſtator after in his will expreſſeth that *B.* ſhall adminiſter alſo with him, and in aid of him; here *B.* is an executor as well as *A.* and if *A.* refuſe, *B.* alone may prove the will as executor, notwithſtanding it be only ſaid, he ſhall adminiſter with *A* and in aid of him. Thus many ways, and by divers words of implication, one may be made executor, although not expreſly ſo named by the will. But if *A.* be made an executor, and *B.* a co-adjutor, without more, he is not by this an executor with *A.* as in King *Hen.* VI. his time was held: nor hath ſuch co-adjutor or overſeer any power to adminiſter, or intermeddle otherwiſe than to counſel, perſwade and adviſe; yet I think he may, and in conſcience ſhould ſo do. And if that will not prevail to rectify negligence or miſcarryings in executors, he ſhall well perform the truſt repoſed in him, if he complain in the ſpiritual court or court of conſcience: and

Vid. poſt. Sup. 139.

The office of a co-adjutor.

21 H. 6. 6. 24 Ed 3. F. Exec. 121. 29 Ed. 3 39.

and it is reaſon I think that ſo doing upon juſt cauſe, his charges be borne out of the teſtator's eſtate, or the executor's purſe, who otherwiſe would not be reformed.

How an executor, or his executorſhip may be limited or qualified in ſpecial manner different from the general.

NOW let us ſee how this making of an executor may be ſpecially qualified. And firſt, the time may be limited when he ſhall firſt begin to be executor; and that either certainly, or with ſome contingency. Secondly, the creation may be conditional. Thirdly, it may be partial or dividedly, and not intirely.

Vid. poſt. Sup. p. 129.
Certainly, contingently.
Conditionally on condition precedent or ſubſequent.
Vide Greyſbroke and Fox, Plowd. A. and B. made executors; but not B. to intermeddle during the life of A. and good.
32 H. 8. Bro. 155.
3 H. 6. fo. 6.

As to the firſt, one may appoint *J. S.* to be his executor a year or more time after his death; this is good. So alſo if *A.* appoint *B.* his ſon to be his executor when he ſhall come to full age, and in the mean time he dieth inteſtate. Again one may appoint the executor of *A.* to be his executor: And then if he die before *A.* he is inteſtate until *A.* die. This creation may alſo be conditional, and the condition may either be precedent or ſubſequent. In the time of King *Hen.* VI. one did name *A.* and *B.* his executors, and if they would not take it upon them, then *C.* and *D.* ſhould be his executors, and *A.* and *B.* refuſed; and the queſtion was, whether in ſuit againſt the debtors of the teſtator, *A.* and *B.* ſhould join with *C.* and *D.* As where four executors be named, and two refuſe, and the other two prove the will, yet all four muſt be named in ſuit againſt the teſtator's debtors, as was there admitted; but in the princical caſe it

was

was reſolved, that the ſuit ſhould be only in the name of *C.* and *D.* for that the appointment of them executors if *A.* and *B.* did refuſe, did imply that then they only ſhould be executors; and here all four were never made, nor intended to be executors, but *A.* and *B.* upon a condition ſubſequent, that they ſhould not refuſe, and *C.* and *D.* upon a condition precedent, *viz.* if *A.* and *B.* did refuſe. It is uſual to make one or more executors conditionally, that they put in ſecurity to pay legacies, or in general to perform the will; nor was it ever doubted, as I think, but that this was good: yet I ſhould adviſe that ſuch condition be plainly thus expreſſed, *viz.* either thus, that if *J. S.* do put in ſecurity, *&c.* by ſuch a day, then he ſhall be executor, elſe not; or thus, *viz.* to make him executor conditionally, that before he do adminiſter (funeral perhaps excepted) he ſhall put in ſuch ſecurity; elſe perhaps, he being executor till the condition broken, in that mean time he may have diſpoſed of all or moſt part of the teſtator's eſtate. In the late Queen's time there was a caſe remarkable to this purpoſe: one willed, that if his wife ſuffered *J. S.* to enjoy *Black-acre* (being belike part of her jointure) for three years, then ſhe ſhould be his executor, or elſe *A. B.* ſhould; and the queſtion was in the *Common Pleas*, whether preſently, before the end of the three years, ſhe were executor; or not till ſhe ſuffered the land to be enjoyed three years; and it was held by all the judges but the lord *Anderſon*, that ſhe was preſently executor, until ſhe ſhould diſturb *J. S. &c.* For upon that done, it was agreed, that the executorſhip would by virtue of the condition be transferred

P. 33 El. Alice Francis, her caſe.

transferred from the wife to *A. B.* But now during theſe three years might ſhe have diſpoſed of all the goods of her huſband, yea, within one of theſe three years, and leſs time, and then have broken the condition, and have left to *A. B.* a dry executorſhip.

Dividedly. 19 H. 8. 3. 19 H. 7. Dyer 4. Hil. 35 El. in com. ban.

Now to the third point; One may divide his executor's power three ways, *viz.* really, locally, or temporally: really thus, he may make, *A.* his executor for his plate and houſhold ſtuff; *B.* for his ſheep and cattle; *C.* for his leaſes and eſtates by extent; *D.* for his debts due unto him; and ſo divide the power and adminiſtration of his executors at his pleaſure. He may divide them or their power locally: *viz.* *A.* for his Goods in *Com. Buck.* *B.* for thoſe in *Com. Ox.* and *C.* for thoſe in *Com. Berks.* He may alſo divide them in time. *viz.* his wife or any other perſon to be executor during her life, or during the minority of his ſon, or ſo long as ſhe continues widow, and after his ſon to be executor. So of like limitations or diviſions, either for time, place or things, wherewith they ſhall intermeddle. Nay, doubtleſs one may be made executor for one particular thing only, as touching ſuch a ſtatute or bond, and no more; and thereof good uſe may be made, as I think thus; Many have bonds, ſtatutes and recognizances, for warranty or enjoying of land, or freeing or ſaving harmleſs from incumbrances, in general or particular. Now he which hath theſe, ſelling the land, may by letter of attorney lawfully aſſign them to the

32 H. 8. Bro. 115.

Vid. poſt. Sup. f. 4, 126.

Bond may be forfeited or releaſed by the obligee, notwithſtanding that he has aſſigned it over to another, and the legal intereſt therein will go to the executors of the obligee, whoſe names muſt be made uſe of.

party

party who buyeth land or leaſe: but this notwithſtanding, the intereſt remains in him who ſelleth, and by his outlawry they may be forfeited, or by him releaſed, any bond to the contrary notwithſtanding; and if he die, the intereſt in law will be in and go to his executors, and in their names only ſuit or execution may be had or maintained.

Quære, If not aſſets in law, when obtained.

Now then if the vendor, beſides aſſignment, make as to the ſtatute, recognizance or obligation, only the vendee executor; by this the intereſt after the death of the party, will be in him actually and really to his more ſafety, ſince none but he can releaſe or diſcharge, nor any other name need to be uſed to ſue, or take benefit thereof. But *Quære*, if the vendee, his heirs and aſſigns, may be made executors, ſo as that ſecurity ſhall go to them one after another, without renewed by making of executors? Thus if the party make no other executor, he dieth inteſtate as to the reſt of his eſtate; and as to this ſpecialty only ſhall have an executor, and muſt have a will proved; and in caſe he doth make another will for his eſtate reſidue, there muſt be two wills proved. But in the other caſe, where by one only will one is executor for one part of the eſtate, and another for another, there being but one will to be proved, one proving of it ſufficeth. And though in the premiſes of a will two be made executors jointly and equally; yet there may be a proviſo that one ſhall not meddle during the other's life, ſo as they ſhall be executors ſucceſſively, and not jointly. And thus alſo to other purpoſes aforeſaid, a ſubſequent clauſe or proviſo may make the partition and diviſion

Quære.

How the premiſſes of a will may be reſtrained by ſubſequent proviſo. 32 H. 8. Bro. Exec.

ſion of authority. But if the proviſo or clauſe ſubſequent be merely contrary to the premiſſes, it will be void: as where two were made executors with a proviſo or clauſe that one of them ſhould not adminiſter his goods; this was held void for repugnancy by *Brudenel* and *Englefield*, juſtices. But *Fitzherbert* juſtice was of mind that it was not void, nor utterly repugnant: for the other might join in ſuits, though not adminiſter. And juſtice *Shelly* was of a third opinion different from all the reſt, *viz.* that here was a repugnancy, but the laſt clauſe ſhould controul the premiſſes; and ſo this one only ſhould be executor.

19 H. 8. Dyer 3, 4.

Who may make an executor.

SOME perſons may be unable to make wills and conſequently executors, for that is all one; whoſoever may make a will, may make an executor. There be nineteen ſeveral kinds of perſons unable, as the *Canoniſts* ſay, to make wills; but with many of them we will not intermeddle, becauſe we find no mention of them in our law. The perſons principally and moſt uſefully to be conſidered of by us are, either the defective in underſtanding, as infants, idiots, lunaticks, and the like; or defective in power or intereſt, as women covert or married, perſons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as aliens, corporations, villains, monks and friers. As for infants and women covert, becauſe much is to be ſaid of each of them and their adminiſtration, we will forbear to treat of them

them in this place, but after will do it of each ſeverally.

To begin with an idiot; naturally he is not able to make a will, as was reſolved in the ſpiritual court, becauſe he wants the uſe of reaſon to conceive what is fit for him to will; nor doth the common law oppoſe this, as I think. Idiot. 3 Eliz. Dyer 203, 204. Shep. Touch. 402, 403, 404. Swinb. part 2d Lunatick. Perk. ch. 7. ſec 479.

A lunatick having *lucida intervalla*, that is, ſome ſeaſons of enjoying his right mind and freedom from his lunacy, may in thoſe times of his right mind make a will and executors, elſe not; for even one by age or ſickneſs become of *non ſanæ memoriæ* is unable to diſpoſe of lands or goods.

One deaf and dumb born may make a grant, ſaith Mr. *Perk.* if he hath underſtanding, which is hard, as he confeſſeth, conſequently much more a will; but in the time of King *Henry* 8. it is left a demurrer, whether a deed by ſuch be good or not. Born deaf and dumb. Vide plus Perk 5, 6. 33 H. 8. Dyer 55, 56 a. Vide 26 E. 3. 63. Lib. Intr. 396.

If but mute, he may wage his law, and attorn by ſigns, and ſo perhaps by ſigns declare his will. 44 *Aſſ. pl.* 36. 18 E. 5. 53. Mute. 26 E. 3. 63. So in effect 44 Aſſ. p. 30. P. 31 Eliz.

An alien may make or be an executor, ſo as he be not an alien enemy, for ſuch cannot ſue, as in the late Qeen's time was held: but there the doubt was, whether a ſubject of *Spain* were at that time to be held an enemy, no war being proclaimed between the kingdoms, though hoſtilities exerciſed. Alien not enemy Paſcatia de Fountain's caſe.

As for Perſons attainted, convicted or outlawed, it will be ſaid, that theſe can have no goods of their own, and conſequently they can make no wills nor executors; and it is not to be denied, that we find it pleaded ſometimes by executors, that their teſtators ſtood outlawed. Attainted, convicted or outlawed.

But

But firſt it is clear, that all and every of theſe may have goods as executors to others, which neither are forfeited by attainder or outlawry, nor deveſted by marriage or villainage. Therefore as touching them they may make teſtaments. And that all theſe ſorts of perſons may be executors, is alſo evident. So alſo touching Villains, monks and friers, who can have no goods to their own uſes. And that one attainted of felony may have an executor, appears by the caſe in the late Queen's time, wherein it was long debated, whether ſuch an executor might maintain a writ of error or not, to reverſe the attainder of the teſtator. And as for other outlawries, the plea thereof by the executors, that their teſtator was and died outlawed, proves not a nullity of the will or executorſhip; for then they might have pleaded that they were never executors. But it tends to this, that no goods did or could come to them for ſatisfaction of the debts, by reaſon of outlawry; yet it hath been delivered, not of old only in many books, but by ſome of late, that debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for treſpaſs in battery, or falſe impriſonment, *&c.* *Quære* of breach of covenant. But goods taken away by a treſpaſſer, may yet be forfeited by the attainder or outlawry of him from whom they are taken, for that property in right ſtill appertained to him, and he might have taken them again whereſoever he found them; therefore the action for this ſhall not come to his executor; but for the other not forfeited it may.

Villains, monks and friers.

What ſhall not be forfeited by outlawry.
29 Aſſ. p. 63.
49 E. 3. 5.
50 Aſſ. p. 15.
33 H. 6. 27.
9 Eliz. Dyer 26. 2. contra.
Co. lib. 4. fo. 95.
19 H. 6. 47.
30 E. 3. 4.
16 E. 4 7.
5 E. 3. 53.
6 H. 7.

Whether

Whether an excommunicated perſon be able to make a will or not, may be ſome doubt, ſince *Keble* denieth him ability to preſent to a church; and in this very point antiently the opinion of *Canoniſts* hath been negative, but more lately grew affirmative.

Excommunicate. 15 H. 7. f. 7. Sum. Sylv. tit. Teſtam. Shep. Touch, 404.

Who may be executor, more.

AN excommunicate Perſon cannot ſue, that is, proceed in ſuit as executor, till he be abſolved, there being danger of excommunication to all that converſe with him; but this makes not a nullity of his executorſhip, nor overthrows the ſuit, but ſtays it only from proceeding until abſolution. As for perſons attainted or outlawed, we have before ſpoken affirmatively in way of proof that they may make executors, for continuation of the executorſhip; ſo of aliens and others before. Recuſants convicted at the time of the death of any teſtator are diſabled to be his executors.

42 E. 3. 1. 1 Inſt 134. a. 21 H. 6. 30. A clerk attaint may be an executor by paſt. Paſcat. de Fountain. But an alien enemy, cannot ſue as executor. P. 31. Eliz. 3 Jac. cap. 5.

Whether corporations compound, or conſiſting of divers perſons, may be made executors or not, I doubt. Firſt, becauſe they cannot be feoffees in truſt to others uſe. Secondly, they are a body framed for a ſpecial purpoſe. Thirdly, they cannot come to prove a will, or at leaſt to take an oath as others do.

Quære, if corporations compound can be executors.

What a man may give or diſpoſe by his will.

HAving conſidered of the makers of executors by *will*, and of them ſo made; let us now conſider what by this *will* may be diſ-

8 Vin. Abr. 43. pl. 23, 59. pl. 5. 11 Vin Abr. 267. pl. 6. 272. pl. 4. 421 pl. 6. Law of teſtaments. Plowd. Com. 525.

poſed, given or bequeathed. And firſt, he who himſelf is an executor cannot by his *will* give or bequeath to any other the goods, chattels, or credits he hath as executor, the property not being altered; for that he hath not them properly as his own, or to his own uſe; only he may make a continuation of the executorſhip, and his executor ſhall have them as executor to the firſt teſtator, as was reſolved by the judges of both benches in the late Queen's time. And if he be adminiſtrator, the bequeſt is then alſo void; nor then will they go to his executor, but to a new adminiſtrator; but on his death-bed he may give them by word or deed, though not by *will*. Next, if a man have debts owing to him, as many have much, it is conſiderable, whether by way of bequeſt in his *will* he can give away theſe to any from his executors. And doubtleſs he cannot effectually in law; they being not ſubject to aſſignment unto any, except the King. So as if he give ſuch a debt to *A.* and ſuch to *B.* yet muſt the ſuit for them be in the name of the executor: and ſo alſo the releaſe or acquittance for them, and not in their names to whom the bequeſt is. But when they be received, if there be no debts to pay, the executor ought to deliver them to the party to whom the bequeſt is, and thereunto may be compelled in court of conſcience, or in the ſpiritual court. Therefore the caſe of the bequeathing money payable upon a Mortgage is in this manner to be underſtood to be good, and no otherwiſe, as I take it.* He that is jointly

Hil. 30 Eliz.

At any time in his life he may alter the property. So 48 E. 3. fol. 14, 15

Where the bequeſt was to one of the executors, it was held that the other executor might releaſe it. If ſufficient, otherwiſe to pay all one as if none 48 E. 3. p. 14, 15.

11 Ed. 3. Fitz. Tit. Cond. 9. where both ſtated jointly by one grant.

Differences between join tenants and in common holding by ſeveral grants

Another kind of Tenants in common.

* Co Lit. 182 Co Lit. 185. Perkins, § 500. Joint-tenants and in common, poſt. 177. Sup.

jointly with any other eſtated in lands or goods, can give no part by his *will*, but all will ſurvive: but by act in his life he may diſpoſe of his part; and the aſſignee may diſpoſe of his moiety by *will*, yea, though it be half a horſe or ox, that cannot be divided. So of a leaſe of lands, or tythes, or grant of goods to two, *Habendum* one moiety to the one, and the other moiety to the other; each may give his moiety by will. But if one be poſſeſſed or eſtated for years by leaſe, wardſhip, or extent, *&c.* in the right of his wife, † or have the next avoidance of a church in her right, he cannot by *will* give or bequeath any of theſe; but, notwithſtanding, they will remain unto his wife, upon his death: but yet his gift or grant of them taking effect in his life-time would bind his wife, and carry away his intereſt from her. If one be tenant for the lives of one or more others, (as oft-times men take leaſes for lives of younger perſons than themſelves) this cannot be by *will* diſpoſed of; for that it is no eſtate of inheritance. Therefore let the party look to convey it in his life-time, leſt it go to an occupant, *viz.* him who firſt ſhall enter. If it be an eſtate in land, he muſt either make livery, have a bargain and ſale enrolled, or covenant to ſtand ſeized to the uſe of his wife or ſome of his Blood, or make a leaſe for years determinable upon thoſe lives. Good if it be by bargain and ſale for years, if the

Co. Lit. 185. a. b. 192, Lit. Sect. 287. See 1 Wilſon, 341.

At this day eſtate pur auter vie is deviſeable by ſtat. 29 Car. 2. c. 3. ſect. 12. quod vide.

† In jure uxoris, poſt. 178. Sup. The huſband may in his life diſpoſe of a term in truſt for his wife, as well as if the legal eſtate was in her. 1 Vern. 7. 18. 2 Vern. 270. So if a term of years is created in truſt to raiſe her a ſum of money. Trin. 1703. between Walter and Saunders.

thing be in leaſe, that ſo without inrolment or attornment the rent may paſs: elſe a bargain and ſale may be made for a month, or ſuch like time, and then a releaſe or grant of the reverſion inſtead of livery and ſeiſin. But if a man have a leaſe for ever ſo many years, determinable upon life or lives, that is, if ſuch or ſuch live ſo long, (which unſkilfulled perſons call a leaſe for lives) this ſtate may well enough be given and diſpoſed by *will*, becauſe it is but a chattel. If a man be ſeized in fee or in tail of land having corn growing upon it, and by his will do give the corn, and die before ſeverance, this is a good bequeſt; becauſe the corn ſhould have gone to the executor. So it is alſo of a perſon touching his glebe, and a man ſeized in the right of his wife, or his own right but for life. But as for trees growing upon the ground, theſe can no otherwiſe be given by *will*, than as the land itſelf upon which they grow may be given; of which matter, as not pertaining to the office of executors, *viz.* how and in what manner land may be given by *will*, I intend not to treat in theſe diſcourſes.

Stat. Merton, &c. 2. Viduæ poſſunt legare tam de ritibus quam de aliis, &c. Quære, If the trees may be deviſed by the ſtat. of *wills*, without giving the land itſelf.

Of the revocation and countermand of wills, and new publication.

HAving conſidered of the making of *wills* and executors, let us before we come to the probate, conſider of Revocation; for *that* may take away the force of a *will* rightly made. A *will* therefore having two parts, *viz. inception*, which is the making, and *conſummation*,

Omne teſtamentum morte conſummatur. See the pleading of it by making a later *will*, Lib. Intra. f. 323. b. & 641. a.

which is the death of the teſtator or maker of the *will*, there is power in him at any time before death to revoke or alter his *will* at his pleaſure. Conſider we therefore of revocations, and alſo of new publications or re-affirmance of *wills*, in whole or in part. As therefore a *will* may be made by word, ſo alſo may a *will* made in writing be by word revoked or diſannulled: for ſince every making of a later *will* is a countermand and ſuppreſſion of the former *will*; and ſince a *will* may be made nuncupatively or by word, and ſo by making a verbal *will* one may revoke a written *will*: it will thereupon follow, that one by word may expreſs the alteration of his mind thus far, that the *will* by him formerly made ſhall not ſtand, but be revoked and annulled; and this *will* ſtand and be effectual, ſo as if he after die, without making any new *will*, or new publication, or re-affirmance of the former, he dieth inteſtate or without a *will*. As a *will* may be wholly revoked, ſo alſo in part. Hereabout a good reſolution was in a *Kentiſh* caſe, where one *Ryete* by his *will* in writing did give ſome gavel-kind land to one *Harriſon*, and five days before his death ſaid in the preſence of witneſſes, that this gift ſhould not ſtand, and that he would alter it when he came home; deſiring them to bear witneſs of his revocation. Now before he came home he was killed by the ſaid *Harriſon*, who cauſed the *will* in writing to be proved, and after he was attainted and hanged for the murder, and his ſon by the cuſtom of *Kent*, (*viz.* the father to the bough, and the ſon to the plough) entered into the land. And this manner of revocation by word only was held ſufficient although the

But how revocations now muſt be, vide 29 Car. 2. cap. 3.

A *will* in writing might be revoked by parol.

14 Eliz. Dyer 310. b.

will in writing was not cancelled, nor defaced. And the like reſolution, for verbal revocation, is implied in the caſe of *Forſe* and *Hembling*; where it being reſolved, that a feme-covert, or married woman, by word countermanding and revoking her will formerly made, when ſhe was a ſole or unmarried woman, this was not effectual, nor of force by reaſon of her coverture taking away the freedom of *her will*. Hereby it is implied, that another who hath freedom of *will* may by word ſufficiently revoke a *will* in writing; and ſo was it ſince alſo admitted in the caſe between Sir *Edward Montague* and *Jeofferies*, touching the *will* of Sir *Jo. Jeofferies:* but there a difference was conceived betwixt ſaying, *I will revoke my will* (which only expreſſed a purpoſe or intent, and therefore was no preſent revocation) and ſaying *I do revoke it*, or *it ſhall not ſtand*, or *my heir ſhall have my land*; *which* croſſed the gift of it by the *will*. And as *wills* may be wholly or in part revoked; ſo may alſo the executorſhip of one or more of the executors, and yet the *will* may ſtand in all the other parts, ſo as there be any one executor or more unrevoked: but if all be revoked, then the whole *will* is revoked, becauſe no *will* can ſtand without executors: and this revocation may be by word only, without being expreſſed in the *will* or any other writing. But I could wiſh all to expreſs ſuch revocation in the foot of the *will*, or that the name or names of the executor or executors ſo revoked be expunged or blotted out of the will, and that this be done in the preſence of ſome witneſſes to teſtify the act and intent of the teſtator.

M. 28 & 29 Eliz. Co. lib. 4. fol. 60. But for this reaſon in that caſe the marriage was a countermand. Vide poſt. Sup. 8. 12.

7 H. 6. f 13, M. 38, 39. Eliz. 2 Syd. 75. Cro. El. 306. Cro. Jac. 497. Diverſity where words ſpoke in the future, and where in the preſent tenſe, Ow. 76. Goulſ. 33. Cro. Car. 51. 3 Mod. 206, 207. What words made a revocation, Cro. Jac. 115. not without expreſs words, and not by words only ſpoke by way of diſcourſe.

Again

Again, revocations may be by act in law as well as in fact, or by direct and expreſs terms; as in the ſaid caſe of *Montague* and *Jeofferies*, where land being deviſed by *will*, and the deviſor after making a feoffment, though there were ſome defect in the livery to make it effectual; or if he made a bargain and ſale that was never inrolled, or granted the reverſion, but no attornment had, ſo as the land paſſed not, yet in all theſe caſes the *will* or gift of land ſtood revoked. But in caſe he had only covenanted that he would have made ſuch an eſtate, and not done it; this was held to be no revocation. And ſo by ſome, in caſe he do but make a leaſe, leaving the fee-ſimple as it was: but of this *Quære*; and if a difference may not be betwixt making a leaſe for years and a leaſe for life, which altereth the freehold. If a leaſe for 20 years be bequeathed to *J. S.* and after the teſtator maketh a leaſe for fifteen years, reſerving a rent; I take this to be no revocation of the bequeſt; but if the teſtator, after this *will* made, take a new leaſe for a longer term, ſo as the former leaſe is ſurrendred in fact, or in law; this muſt needs be a revocation of the bequeſt, or at leaſt an adnullation thereof; and that although the bequeſt were generally of his leaſe, not mentioning the number of years; for this which he now hath is another leaſe, and not *that* which he had at the time of the making of the *will*. So if one give his black gelding by *will*, and after, before his death, he ſelleth or giveth away that horſe, and buyeth another black one; this new-gotten horſe ſhall not paſs by the *will*, becauſe it was not the teſtator's at the time of making his *will*. So alſo if the crop

Revocation by act in law. Vide 6 E 6. Dyer 74. & 3. & 47. & M. 42. 2.

Note the ſtatute does not extend to implied revocations. 1Rol. Abr. 615. pl. 6 See Darley v. Darley 3 Wilſon, Trin. 7 Geo. 3.

1Rol. Abr. 615. pl. 3.

in the barn be bequeathed in *October*, and the party lives till that time twelve months, having ſold that crop, and inned a new, this later cropt ſhall not paſs by the will, and the former cannot.

Again, as revocation may be by alteration of the eſtate of the deviſor in the land deviſed; ſo may it alſo be by alteration in ſome caſe, of the ſtate or quality of the perſon of the deviſor. As if a woman ſole make a *will*, and after take a huſband, this, without any more, as is reſolved in the ſaid caſe of *Forſe* and *Hembling*, doth work a revocation or adnulation of the *will*; for that elſe it ſhould be then irrevocable, ſince ſhe having loſt the freedom of her will, cannot actually and directly make a revocation as we before have ſhewed. But notwithſtanding her *will* be revoked, yet in caſe her huſband before or after marriage with her were bound or covenanted to perform this woman's *will* if he ſo do not, by payment of the legacies therein bequeathed, his bond or covenant will ſtand good and be ſuable againſt him: as was adjudged touching the *will* of *Elizabeth Smaleman*, married after her *will* made to one *Wood*, who firſt was bound to perform it. Yet another caſe there is of alteration in the ſtate of the teſtator's perſon which makes no revocation of his *will*; as if he being of ſound mind and ability make a *will*, and after becometh frantick. In this caſe this is no revocation; ſo as his *will* ſtands till his death irrevocable, if he recover not. Now of a *will* revoked there may be a reviver by a new publication; and thereof now.

Cro. El. 27. Cro. Car. 219, 376, 597. tho' it is no *will* nor ought to be proved, but an appointment which he is bound to perform.

Of

Of new publications.

HAving ſhewed how a *will* may be revoked, and ſo loſe its force; let us now ſee how without making a new *will*, *that* ſo revoked may be revived and ſet on foot again. And that is divers ways. As, firſt by a *Codicil* annexed after thereunto; as was reſolved between *Betford* and *Barnecot* in the king's bench. Secondly, by adding any thing to the *will*, or making a new executor. Thirdly, by expreſs ſpeech or word that it ſhould ſtand, or be his *will*: as I conceive to have been the better opinion in the ſaid caſe of *Montague* and *Jeofferies*, wherein yet was much difference of opinion, both touching revocation, and new publication. If a Man having made a former *will*, do make a later, which is more than a bare revocation; yet if afterward, lying upon his death-bed and ſpeechleſs, both theſe *wills* be delivered into his hand, and he required to deliver to one of his friends about him *that will* which he would have to ſtand, and to keep in his hand the other, and he thereupon delivereth to the Miniſter, or other his neighbours, the firſt made *will*, retaining in his hand the later, as was done in the time of *Edward* the third; here the former *will*, though made void many years before by the later, is revived, and ſhall ſtand as the party's *will*. But now put the caſe that a bequeſt at the firſt is void; yet by publication after it may be good: as if one give to *Sarah* his wife a piece of plate, or other thing, and hath no ſuch wife at the time, but after marrieth one of that name, and then publiſheth his *will*

In the caſe of Beckford and Parnecot, according to Cro. El. 493. It was adjudged a new publication on words ſpoken by the Teſtator, and not by annexing the Codicil; for whether that would have been ſo, three judges doubted againſt one.

44 Aſſ. p. 36.

44 Ed. 3. f. 33.

Co. Lit. 111. Co. Ent. 124, 327, 585. Plow. 343. Salk. 237, 238. 11 Mod. 123. Holt's Rep. 240, 244. 747. Fitzgib, 240. Swinb. 88. Gilb. Law of Deviſes 11, 124, 146. 2 Bac. Abr. 49. Eq. Abr. 172. Vin. Abr. 54. pl. 5. 3 & 4 P. & M. Dy. 48.

will again: now this ſhall be a good bequeſt. So if one deviſe lands or goods which one hath not; if he after do purchaſe the ſame, and then ſay, that his *will* before made ſhall ſtand, or be his *will*, it ſhall be a good *will* and bequeſt; for this in effect is a new making. And though moſt of the precedent caſes be of revocation of particular parts of the *will*, and not of the total; yet firſt, be it conſidered, that *that* part ſo revoked was in effect, the ſubſtance of the *will*; next, it is eaſily diſcerned, that if one part be revokable, ſo is another alſo. And thus revocation may ſpread itſelf over the whole: nay, doubtleſs the whole *uno flatu* may be revoked, as well as by parts. And as the *Velleities* or diſpoſing parts of the will are revocable and revivable by new publication, as aforeſaid; ſo is alſo the conſtitution of executors. As if one of the executors names be ſtricken out, and afterwards a *Stet* be written over his head by the teſtator or by his appointment, now is he a revived executor. So if the teſtator expreſs by word, in the preſence of witneſſes, that the party put out ſhall yet be executor. But now I mean where the executor's name is not ſo blotted out but that it may be read and diſcerned; for elſe the *Stet* is upon nothing: and if the verbal re-affirmance ſhould renew his executorſhip, then muſt the *will* be partly in writing and partly nuncupative, his name not being to be found in the written *will*.

Executors revivable by a *Stet*.

By words.

His name muſt be diſcernable in the will.

☞ But great alterations being made in theſe caſes by ſtat. 29 *Car.* 2. *ch.* 3. the directions of that ſtat. muſt be obſerved.

CHAP.

CHAP. II.

Of the ſtate of things inſtantly upon the teſtator's death, before any will be proved.

Here we will conſider theſe ſeveral things;

1. *What is wrought by a gift of a thing certain and known; as the white horſe the red cow,* &c. 2. *What by a bequeſt to an executor.* 3. *What is wrought by a releaſe in the* will *to a debtor.* 4. *What by making a debtor or creditor an executor,*

AS touching the firſt, *viz.* the bequeſt of a chattel, real or perſonal, which the teſtator had in poſſeſſion: notwithſtanding that if the ſaid teſtator had by his deed or writing, or but by word on his death bed, or before given theſe his goods, and died before they had been taken, he to whom they ſo were given might have taken them; yet in this caſe of gift by *will*, neither can the legatee, *viz.* he to whom they are bequeathed, either take them or recover them from the executor, or a ſtranger take them by any ſuit at law for that he hath no property in them; yea, if the bequeſt be to himſelf who is made executor, be it of a leaſe, plate, chattel, *&c.* they ſhall not veſt nor ſettle in him as legatee, but as executor, until expreſs or implied election; but he is to

Co. Lit. 111. Keil. Rep. 128. Dyer 254. Swinb. 24. 11 H. 4. 84. All 39. Stil. 54. 73. Br. deviſe. 11 March 137. 39 El. B. R. P. 11. J. 13. March 96. 1 & 2 P. & M. D. 110. a. and 139. b: Vide Co. 8. f. 95 & 96. On the ſecond, ſee Co. 10 f. 47. So reſolved Paſc. Tr. 37. El. in B. R. only Gow. contra, aſſent of one executor only.

Portman El. & Sim. Def. See more of this tit. Legacy; and of the

have

Why executors aſſent neceſſary to the legacy, vide poſt. Sup. pl. 11.

have and take the ſame by way of legacy. And the reaſon in both caſes is this, *viz.* that the law prefers debts and the ſatisfaction of them before legacies and ties executors alſo to that rule; and therefore will transfer nothing from or out of the executor, till he having conſidered of the ſtate of the debts to be paid, and goods out of which the ſame are to be paid, ſhall find that ſafely this or that legacy may take effect without making any defect in payment of debts, or drawing upon him and his own goods any damage or loſs, as a waſter, and thereupon ſhall aſſent to ſuch legacy. Thus now is the law taken; but heretofore ſome opinion hath run otherwiſe, *viz.* that he to whom any bequeſt was made of a thing known and certain, might take it without any aſſent of the executor; and that when to the executor himſelf any goods or chattels, movable or immovable, were bequeathed, in caſe there were otherwiſe ſufficient goods for ſatisfaction of debts, the ſame ſhould inſtantly upon the teſtator's death, without any act or election by the executor, be transferred into and under him in his own right as a legacy, and not remain in him as executor. As for ſums of money bequeathed, or ſo much in plate or rings, it is evident that they muſt be had by the delivery of the executor: yet hath the legatee ſuch an intereſt before delivery, as that, dying before payment, it will go to his executors. But, as I take it no ſuch perſon, to whom any thing certain is given by *will*, can make any gift or grant of it before the executor have aſſented to his having thereof: nor, perhaps will the executor's aſſent after the grant have ſuch relation as to make

27 H. 6. 8. Of late, perhaps, ſome ſingle or ſudden opinions may alſo have run that way: but in Portman's caſe the point was divers times argued, and then adjudged as before, To be bought.

make good the grant precedent; why ſo, yet, more than an attornment of a leſſee, which is a like aſſent to the grant of another? and *Quær.* if by the outlawry of the legatee before the Executor's aſſent this thing bequeathed be forfeited.

* If without juſt cauſe an executor will refuſe to aſſent, he is compellable by law ſpiritual, or court of conſcience; yet if the ſpiritual court preſs to do, where is juſt cauſe to ſtay, a *Prohibit.* lieth, *ut credo*; for ſince executors ſtand liable to recovery of debts againſt them by common law, it is reaſon that law enable them to keep wherewith to pay. And here yet note ſome ſeeming oppoſition of the law: for where before great difference was ſhewed between a deviſe or bequeſt, and a gift or alienation executed in one's life-time; yet the Lord *Dyer* reports it to be reſolved, that where a leaſe for years was made upon condition that the leſſee ſhould not alien in his life-time, yet a bequeſt of this leaſe by his *will* was a breach of the condition, as being an alienation in his life-time.

Quær. Of this; ſee more after, tit. legacy thereabout.

2. Of diſcharge by *will* to a debtor, ſome queſtion may be, whether to perfect and make good this, ſo as the debtor may plead it in bar, there be not requiſite, as in the former, an aſſent of the executor? On the one ſide ſince this giving is a forgiving, for he to whom it's bequeathed cannot otherwiſe have it than by way of retainer; it may probably be ſaid, that here needs

* A legacy is not recoverable at common law, but in the eccleſiaſtical court, chancery, or exchequer.

needs no ſuch aſſent of the executors, as in the caſe where any thing is to be transfered; for here is rather an extinguiſhment and an exoneration, than a paſſage of a chattel by way of donation. On the other ſide, it is probable that it being but a bequeſt, and ſo a legacy, ſince debts are in law and conſcience to be ſatisfied before any legacies; therefore the executor having not ſufficient otherwiſe to ſatisfy his teſtator's debt, may ſue for this debt, and refuſe to ſuffer it to paſs away as a legacy. And to this opinion do I incline, as beſt for creditors; and ſatisfaction of debts is by law reſpected as an act greatly concerning the teſtator's ſoul. But ſome will perhaps, make a contrary doubt, that although there be an aſſent of the executors to this diſcharge, yet it will not amount to a legal releaſe; for that a debt, at leaſt if it be by ſpecialty, cannot be releaſed but by deed, and a *will* is no deed; for a ſeal is not neceſſary thereunto, though it be fit and convenient. Whereto I give this anſwer, that a *will* though it be not properly and legally a deed, for it may be good enough without ſeal, which is an eſſential part of a deed; yet hath it the force and effect of a deed: for as a releaſe cannot be made but by deed; ſo neither can an eſtate or intereſt, though but for years, in tythes, advowſons, commons, fairs, and like things be granted or aſſigned otherwiſe than by deed yet it is clear that ſuch an eſtate for years in any of theſe may be given by *will*, as well as a leaſe of Land; which proves a *will* to have the force and effect of a deed.

Unumquodque diſolvitur eo modo quo ligatur.

Being things that lie in grant.

Of

Of making a debtor or creditor executor: and firſt of the debtor made executor.

SUppoſe we then that *A.* and *B.* being made executors, the teſtator was indebted to *A.* twenty pounds, and *B.* was indebted to the teſtator twenty pounds, how do things ſtand preſently upon death? Firſt, it is clear that the debt of *B.* to the teſtator ſtands in law extinct; this making of him executor being a releaſe in law.

21 H. 7. 31. Plow. Com. 185. contr. Danby & Choke. 8 E. 4. 3. And may be granted, that he ſhould account before the ordinary for it.

Therefore let creditors take heed of making their debtors executors. And yet doubtleſs (methinks) ſuch a debtor made executor ſhould hold himſelf reſtrained in conſcience from taking benefit thereof, if (the debt remitted) there ſhall want to ſatisfy either debt or legacy of the teſtator. And I doubt whether a court of conſcience may not juſtly ſo order, the teſtator being perhaps ignorant of this point in law, that this debt ſhould be releaſed by making the debtor executor.

Yet it ſeems Plowd. 86. a. the law was taken to be ut ſupra. 8 E. 4.

And what is ſpoken of making the debtor executor, generally the ſame is to be underſtood of making any one of the debtors executors, where there be many joint-debtors: and ſo where may executors be made, and but one of them is debtor to the teſtator; for they cannot ſue without making him who is the debtor alſo a plaintiff, which he cannot be againſt himſelf. The like law touching action of treſpaſs or account. Yet of old, where one made his bailiff one of his executors together with *A.* and *B.* who brought an action of account againſt the bailiff in their two names only, juſtice *Herle* held the action well brought. This was in the begining

Though he never adminiſter. 21 E. 4. 3. 81. 11 H. 6. 38.

2 R. 3. 20. per Starkey, & 22. per Vavaſor 9 H. 5. 13. left a demurrer in treſpaſs by all, againſt the executor, who was treſpaſſer,

3 Ed. 3. 23. beginning of King *Edward* the third his time; but the contrary hath been ſince reſolved. Some

6 H. 4. 3. 6 Ed. 4. 5. Cook. alſo have held, that though in the life of this executor who was a debtor he could not be ſued; yet after his death, the ſurviving execu-

21 H. 7. 31. 20 E. 4. 17. tors might ſue his executor. But that cannot be, as I take it, for that debt was utterly ex-

21 E. 4. 3. 61. Plowd. Com. 36. Plowd. Com. 185. tinct by the making of him executor, as if the teſtator had releaſed it to him; yea, though his executor died before he did ever adminiſter or prove the *will*. And like extinguiſhment of the debt, if the creditor marry with one of the

11 H. 4. fol. 83, 84. executors of the debtor: yet was there an action of debt maintained *temp. Ed.* 3. by the huſband and wife againſt the huſband and other

31 E. 3. Fitz. Ex. 72. executors, upon an obligation by the teſtator to the wife before her marriage. But if a debtor take adminiſtration of the goods of his creditor, this, methinks, ſhould not diſcharge him, but this his debt ſhould ſtand as *Aſſets* in his hand, becauſe the inteſtate did no act to free him from the debt.

The debtee, or creditor made executor.

Plowd. Com. 158. By all the judges but Brook chief juſtice, Plow. 185. b. where the goods be of more value of wh ch ſhall be ſo a.tered.

THis making of the debtee executor, and ſo the party who both ſhould pay and be paid the debt, giveth him clearly power to pay himſelf before any other, if his debt be by ſpecialty, or upon record. Nay, ſome have held, that ſo much of the goods of the teſtator ſhall be altered in property out of the executor as executor, into him as creditor; but how that can be I cannot ſee: for whether it ſhall be ſatisfied out of the leaſes and chattels, real or perſonal, whether out of the corn in the barns, cattle in the

See Plow Com. 544. the like of a legacy of 20 l. given to the executor.

the fields, plate, or houſhold-ſtuff, this, till ſome election made by this debtee executor, cannot be known, nor ſhall be effected by any operation of law preventing the executor's election in taking his ſatisfaction where and how he will. For certainly, as an executor hath election to pay which creditor he will firſt, ſo hath he election to pay and ſatisfy himſelf by what part of the teſtator's goods he will; yet, perhaps, if there be ready money in the executor's hands, there ſhall be an alteration of the property of ſo much thereof as was owing by the teſtator come not to the executor. And if there come not to the hands of ſuch executor ſufficient to pay himſelf, he may have an action of debt againſt the other executors, or the heir, as by ſome hath been conceived: yet let it be well adviſed of, whether, if he do adminiſter at all, and eſpecially if he pay himſelf any part, he have not thereby barred or diſabled his ſuit for the reſidue. But if he refuſe to adminiſter at all, it were very unreaſonable that he ſhould not be able to ſue the other executors: for ſo a debtor might by ſubtilty make his creditor an executor with others, and take a courſe that his goods ſhould come only into the hands of thoſe others, ſo as the creditor could not pay himſelf; and conſequently, if he could not ſue the other executors, he ſhould thus be ſtripped of his debt by a ſlight. *Quære*, if he may bring the action in the name of the other executors only, the *will* being proved in his name as well as in the names of the reſt; or whether the action ſhall not be brought in his name alſo, and then he be ſevered at his own prayer. But againſt the heir there is none to

Or if the goods amount in all to no more than this debt.

See Plow. Com. 158. 13 H. 8. 15. 11 H. 4. 83. 12 H. 4 21. 20 E. 4. 17. 21 Ed. 4. 3.

Plow. 184. b. & 185. b. He is barred; for he cannot apportion his debt.

12 H. 4. 21. He may ſue the heir if the heir be bound, and he hath not ſufficient goods as executor.

join with him: and he may ſue, if he have not adminiſtred as executor; this admitted, that the bond extend to the heir, which without expreſs words it doth not, though for the executor it be otherwiſe. †

Thus having conſidered of the ſtate of things before and without any *will* proved, or other act done by executors; we ſhould now come to the point of the proof: but two things pertinent to it are in order precedent.

CHAP. III.

1. *What may be done by or to an executor before proving of the will.* 2. *Of refuſal, and the Things incident thereunto.*

Before probate what may be done by or to executors.

AS to this, it is clear, that before proving of a *will* by the executor he may ſeize and take into his hands any of the goods of the teſtator; (yea, enter into the houſe of the heir if not locked) ſo to do, and to take the ſpecialties of debts; and generally he may do all things which to the Office of an executor pertain, (except only bringing of actions and proſecution

Vide poſt. Sup. p. 41, 75.

May releaſe before probate. Co. Lit. 292.

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* If the heir is not expreſsly bound in the bond of his anceſtor, he is not bound at all. 2 Saund. 136: But the executor is bound by his teſtator's covenant though not named therein. Dyer 14 & 305. Vide poſt. Sup. 235.

ſecution of ſuits.) He may pay debts, receive debts, make acquittances and releaſes of debts due to the teſtator, and take releaſes or acquittances of debts owing by the teſtator: yea, if before ſuch proving the day occur for payment upon bond made by or to the teſtator, payment muſt be made to or by this executor, though no will be proved, upon like pain of forfeiture as if the *will* were proved. Alſo an executor my before probate ſell or give away any of the goods or chattels of the teſtator. And whereas the aſſent of an executor is neceſſary to the ſettling an execution of a legacy, as before had been ſhewed; ſo as if one give me his white horſe, or black cow by *will*, or any other well known thing, I cannot after his death take it, though I come where it is, but am puniſhable by action of treſpaſs at the executors ſuit, if he do not aſſent; yet an executor before the *will* proved may give his aſſent, and it will ſtand good. Yea, although he die after any of theſe acts done, the *will* being never proved by him; yet do theſe acts ſo done ſtand firm and good as I take it. Yet (as I find) an executor making his *will*, and dying before he hath proved the *will* of his teſtator, his executor may not prove both the *wills*, and ſo become executor to both the teſtators. But in caſe the goods were, after debts paid, bequeathed to the executor, his executor may take adminiſtration of the firſt teſtator's goods with the *will* annexed; as by Dr. *Drury* was in the late Queen's time declared to be the law and courſe of the court ſpiritual; to which credit was given by the judges of our law and the court of *Star-chamber*: for though the Book

9 E. 4. f. 33. 47. 7 H. 4. 18. They cannot ſue till they have the will under the ſeal of the ordinary.

Wray 23 El.

Keilw. Rep. 128. Dyer 254.

22 & 23 El. Dy. 372.

doth not mention it to have been in the *Star-chamber*, it is elſewhere ſo reported. Yea, an executor for goods of the teſtator taken from him, or a treſpaſs done upon the leaſe-land, or a diſtraining or impounding of goods or cattle, may maintain, before the *will* be proved, actions of treſpaſs or replevin, or detinue; for theſe actions ariſe upon the executor's own poſſeſſion.

For here he need not name himſelf executor.
Dy. in ! low. Com. 281. Caſe of Greyſbook and Fox.

But before the proving of a *will*, an executor cannot maintain a ſuit or action of debt, or the like. And the reaſon is, for that therein he muſt ſhew forth the *will* proved under the ſeal of the ordinary. And ſo as I take it, muſt it be, if he bring any action for treſpaſs done or goods taken in the teſtator's life-time; ſo as the teſtator himſelf was intitled to the action, and it grows not upon the executor's poſſeſſion. I find that an executor granting the next avoidance of a church which to him came from the teſtator, the grantee maintained a *Quare Impedit*, without ſhewing forth the *will*: but the executor himſelf might ſo have done as of his own poſſeſſion before the *will* proved, and ſo, without ſhewing it under the ſeal of the ſpiritual court as well as actions of treſpaſs or replevin, for goods taken after the death of the teſtator: yet in the principal caſe of *Greysbrook* and *Fox*, which was an action of detinue by the executor for goods taken or detained after the teſtator's death, the plaintiff did ſhew forth the *will* proved. But that proves not any neceſſity thereof; or that, if the *will* had not been proved, it could be no hurt to ſhew it forth. So upon his own contract for the teſtator's goods: as if the executor ſell cattle or other goods of the teſtator before the *will* proved, he may for the money

He muſt ſhew the probate upon declaring.

34 P. & M. Dy. 135. a. Dy. in ! low. Com. 281. a.

Plow. Com. 27. b.

ney payable maintain an action for debt before he have proved any *will*: and in this, and the action of treſpaſs, there is no neceſſity of naming him executor. Alſo, on the other ſide, an executor may well enough be ſued for debts of the teſtator before the *will* be proved; for he may not by his own act of delaying the probate of the *will* keep off ſuits, except he will refuſe in due manner, that ſo adminiſtration being granted, there may be ſome body ſuable by the teſtator's creditors for debts by him owing. And the uſual plea of the defendant, to eſtrange himſelf from the teſtament, is to ſay, that he neither is executor, nor hath adminiſtred as executor, ſo as if he either be executor *de jure*, or *de facto*, by his own act of adminiſtring, it ſufficeth.

So in trover for goods taken after teſtator's death, and the ſame I ſuppoſe in trover for goods taken in teſtator's life-time, if the executor has made a demand. Qu.

Of refuſal to prove the will, and therein of adminiſtration, fore-cluding refuſal.

NOW as touching the other point fit to be thought of before we meddle with the probate, *viz.* Refuſal to prove; we will thereabout conſider theſe ſeveral parts *viz.* Firſt, how and in what manner refuſal may or muſt be. 2. In what caſes or in reſpect of what acts one named executor hath loſt or determined his election of refuſal or acceptance. 3. Of what effect and opperation the refuſal is; what difference where all the executors refuſe, and where but ſome or one of them. Fourthly, what relation it hath.

Now touching the firſt: the ordinary before committing adminiſtration, where a *will* is made and executors named, if he know of it, muſt

3 H. 7. 11.
9 Ed. 4. 47.
3 Hen. 7. 14.
Plow. Com. 281

ſend out proceſs againſt the executors to come in and prove it: and if they do not come, they are to be excommunicate; but if they do come, if they, nor any of them, will prove it, by reaſon of ſuch refuſal the ordinary may commit adminiſtration; perhaps alſo they may be appointed executors at a time future, and not preſently. Now refuſal cannot be verbally or by word, but it muſt be by ſome act entered or recorded in the ſpiritual court, and therefore muſt be done before ſome judge ſpiritual, and not before neighbours in the country; for that is not effectual. Yet Sir *Ralph Rowlet* making the lord keeper *Bacon*, *Catlin* chief juſtice, and the maſter of the rolls, executors; they wrote a letter to the ordinary, that they could not attend the executorſhip, and therefore wiſhed him to commit adminiſtration; who did ſo, making every of their refuſals to be recorded: and this was held good. So as a leaſe being by that will bequeathed to *Catlin*, and he, after this refuſal, entring and aſſigning it to one, and the adminiſtrator aſſigning it to another; it came in queſtion between them whether had beſt right; and judgment was given for the aſſignee of the adminiſtrator againſt *Catlin*'s aſſignee: whereas if the refuſal had been void, *Catlin* had continued executor, and ſo his title had been better. In caſe the ordinary himſelf be made executor, there (ſaith the book) he may refuſe before his commiſſary: and ſo was it there pleaded for the archbiſhop of *Canterbury*, who was made executor to Sir *Will. Oldhalle*.

9 Ed. 4. 33. See Pl. 184. a. If debtee made executor ſue the ordinary for the debt this amounts to a refuſal of the executorſhip. M. 2 . . 29. Eliz. inter Brooker & Carter in Ba. Com. Vide poſt Sup. 74.

9 Ed. 4. 33. The book calls him cardinal of Canterbury.

What ſhall be ſuch a meddling or adminiſtring by an executor, that he cannot refuſe after.

AS to the ſecond, where an executor hath adminiſtred, he cannot afterwards refuſe, becauſe he hath already accepted of the executorſhip, and ſo determined his election: at leaſt the ordinary ought not to accept of ſuch refuſal, but ſhould compel him to take upon him the executorſhip, as the law was taken both in the time of *Ed.* 4. and Queen *Elizabeth.* Yet if the ordinary do admit one to refuſe, notwithſtanding that he hath adminiſtred, this ſtandeth good, as it ſeemeth conceived by the judges in the time of *H.* 6. For there the executor commanded one to take the goods of the teſtator out of the hands of *J. S.* who did accordingly, and afterward the executor refuſed before the ordinary, and adminiſtration was committed to the ſaid *J. S.* who brought an action of treſpaſs againſt the party ſo taking the goods from him; and there the refuſal and committing adminiſtration were admitted to be good: ſo perhaps *Factum valet quod fieri non debuit.* And it well may be that the ordinary did not know of the executor's ſuch intermedling at the time when he did admit his refuſal. After refuſal, and adminiſtration committed, the executor cannot go back to prove the *will*, and aſſume the executorſhip: but if only upon the executor's making default to come in upon proceſs to prove the *will*, the adminiſtration be committed; here the executor may yet at any time after come and prove the *will*, and ſo undo the adminiſtration; as was in the late Queen's time reſolved between *Bale* and *Baxter.*

Vide poſt. Sup. P. 143.

9 Ed. 4. 47. Selling land as executor is adminiſtration, Dyer in caſe of Greyſbrook and Fox. Pl. Com 280. b. Paſ. 7 Eliz. 36 Hen. 6. f. 7, 8.

Mich. 27 & 28 Eliz.

But what if after refuſal it ſhall appear to the ordinary, that the executor hath adminiſtred before his refuſal, ſo as had it been then known, the ordinary ſhould not have admitted him to refuſe? Whether now may he revoke his adminiſtration, (for it is revokable) and enforce the executor to proceed to proving of the *will*? And ſurely, methinks he may; for that the executor by adminiſtring hath determined his election, and accepted the office of exeeutorſhip: now he cannot both accept and refuſe. Beſides, we know that creditors may maintain their ſuits againſt him having once adminiſtered; the common plea to free himſelf, and to ſhew that he is not the party ſuable for the teſtator's debt, being that he neither is executor, nor ever did adminiſter as executor; wherefore he having adminiſtred, it will be found againſt him. Now it is not congruous that in the ſpiritual court there ſhould be no executor, and yet in the courts of *Weſtminſter* there ſhould be an executor. But ſince this point of adminiſtring is ſo material to the point of being admitted or not admitted to refuſe, we will here conſider in this place briefly what ſhall be ſaid to be an adminiſtration by an executor determining his election, and diſabling his refuſal, and what not.

Boxel's caſe in Com. Ban.

A being executor did adminiſter, and yet would not prove the *will*. B. took adminiſtration; and being ſued for debt, did plead the matter ſupra, and it was held a good plea; and it was found for him before Juſt. Doddridge ad Ox. in a ſtat. 2 Carol Reg.

What ſhall be ſaid an adminiſtration.

32 H. 6. 7.

1. Some will perhaps conceive, that the act of the executor in the fore-mentioned caſe, where he only commanded *J. S.* to take goods of the teſtator's out of a ſtranger's hands, was no adminiſtration; and it is true that in that book it is paſſed in ſilence, and not expreſly ſaid to be an adminiſtration. But the Lord *Dyer* in the caſe of *Greysbrook* and *Fox*, ſpeaking of that caſe, ſaith expreſly, that the ordinary might there have

20 Ed. 4. 17. & 21 E. 4, 5.

have rejected the executor's refusal; for, saith he, when the executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit *that* to have been an administration. And elsewhere it is held, that if an executor takes goods of the testator, and converts them to his own use, this is an administration; yea, if he do but take them into his hands, say some, without converting of them. If the wife takes more apparel of her own than is necessary, this is an administration as the book admits; but if by the assent or delivery of the executor, it is not. More clearly, if one do either pay debts of the testator, or receive debts, or make acquittances for them, or demand the testator's debts as executor, or give away goods which were the testator's, or deliver money of the testator's for fees about proving the *will*; all these be full and clear administrations as executor. But, saith *Fitz-herbert*, if he only lay out his own money for fees, this is no administration; so saith *Frowick*, if he pay debts with his own money, and if he do it about the funerals. But some difference may be between acts done by one named executor and by a stranger, *viz.* to make him an executor of his own wrong; whereof we shall speak after, not in this place. If one being sued as executor take it upon him, and plead in bar as an executor; this is an administration.

21 Ed. 4. 5.
21 H. 6. 9, 20.
33 H. 6. 3. 1. 8.
1 El. Dy. 166.
13 Ed. 3. Exec. 91. 3.
4 Ma. Dy. 135.
26 H. 8. 7, 8.
20 H. 7. Kelw. 63.
21 Ed. 4. 5.
20 H. 7. f. 5. a.
9 Ed. 2. 13, 14.
33 H. 6. 31. a.

Of the force and effect of refusal.

AS to the third point, *viz.* the force or effect of refusal; first it is clear that if there be but one executor, and he do refuse, or being many,

Vide post. p. 39. & 51 in the Sup.

Cook l. 5. 28. Cont. 18. E. 3. Bro. 8. 7.

many, if they do all refuſe, then is the party dead inteſtate, and adminiſtration is to be committed with the *will* annexed, as is before ſaid, nor can any after meddle as executors. But in caſe there be divers executors, *viz. A. B.* and *C.* and *A.* only refuſeth, and the *will* is proved by the others, there *A.* continueth executor notwithſtanding his refuſal; ſo as he ſtill may releaſe debts of the teſtator, and debts owing by the teſtator may be releaſed to him; yea, if ſuit be to be had by or againſt the executors, it ſhall not be in the name of *B.* and *C.* only, but *A.* alſo muſt be named as a plaintiff or defendant, elſe the action may be overthrown. For the *will* being proved, all the executors therein named ſtand and continue executors, notwithſtanding any of their refuſals; as it was reſolved in the latter end of the late Queen's time, according to divers former reſolutions. And therefore this executor which hath refuſed may afterwards adminiſter at his pleaſure, and intermeddle with the goods as well as the others; yet, ſaith *Brook*, Chief Juſtice, after the death of his companions he cannot ſo do; but then the executor of him who proved, is only to adminiſter. *Quod non eſt lex.* There may be ſome difference between ſuits by executors, and ſuits againſt executors: for when they themſelves ſue, they being privy to the *will*, and having the cuſtody of it, muſt bring their action in the name of all the executors according to the *will*; but he that is to bring an action againſt them need not perhaps take notice of more executors than thoſe that have proved the *will*, or otherwiſe do adminiſter; for it is no good plea for themſelves in an action againſt them to ſay, there is another ex-

22 Ed. 3. 19. 15 Ed. 3. Exec. 8.

41 Ed. 3. f. 22. 21 Ed. 4. f. 24.

42 El. Co. 9. f. 26, 27. 4 & 5 Ph. & Ma. Dyer 169. c. 6. Contra 21 E. 4. 23, 24.

executor, without ſaying alſo that he hath adminiſtred, as it ſeemeth by divers books. Nay, one book in the time of *Henry* 8. goeth farther, *viz.* That if the ſuit be brought againſt all, yet one of them not intermeddling with the proving of the *will* may plead that he was never executor, nor adminiſtred as executor. By this it ſhould ſeem that executors refuſing (I mean all of them, ſo as no *will* is proved) they in an action againſt them may ſay that they were never executors: but methinks, they ſhould not ſo plead, but ſhew the ſpecial matter, as was done in the time of *Edward* the fourth.

Swinb. 395

33 H. 6. 38. a. Co. 9. 37. b. 32 H. 6. 25. 27 H. 8. 11. per totam curiam.

9 Ed. 4. 33. Co. 9. f. 36.

As for relation I will forbear to ſpeak, till I come to proving; for that probate and refuſal ſtand in the ſame ſtate as touching relation.

CHAP. IV.

Of proving wills.

NOW let us ſee touching the probate of *wills* what is conſiderable; and therein of theſe three or four parts:

Vide poſt. Sup. p. 23.

1. *Where, and before whom, and how the proof muſt be.*
2. *What ſhall be* bona notabilia, *to intitle to probate.*
3. *What force or validity either a right or erroneous probate hath.*
4. *What relation either probate or refuſal hath.*

As touching the firſt point, *viz.* How, and where, and before whom *wills* are to be proved, briefly thus:

The

Wills proved in ſome manors by preſcriptiou. 2 R. 3. Fitz. Co. lib. 9. f. 43.

The proving is in the ſpiritual court: yet in ſome manors, by preſcription, *wills* are to be proved before the ſteward, though no lands thereby paſs, as appears by divers books: and in the manor of *Mansfield* is this preſcription; and in others, whereof *Tremaile* was ſteward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge touching the manors of *Cowley* and *Caverſham* in the county of *Oxford*, where I have kept the courts of the Lord Viſcount *Wallingford*, and found it in preſent and frequent uſe. And it is ſaid by the judges in the time of King *H.* 7. That this proving of *wills* in the court ſpiritual is not antient, but of later time. Yea, it is acknowledged by *Linwood*, the dean of the arches, that it pertains not to the ſpiritual court of common right; nor is ſo in uſe in other kingdoms. The reaſon why the law of *England* hath herein given way to the ordinary and court ſpiritual, is ſaid by *Walſh*, in *Greyſbrook* and *Fox*'s caſe, to be the piety and integrity which is preſumed to be in thoſe of that function, having charge of ſouls. Indeed they are, as it ſeems to me, executors of the new teſtament, or laſt *will* and teſtament of *Jeſus Chriſt*, whereby great legacies and gifts are given to men, and by paſtors to be diſpenſed and diſtributed: of which diſtributors it is required, as St. *Paul* ſaith, *That they be found faithful.* And happy are they who with him can plead *Plene Adminiſtravit*, *viz.* that they have fully adminiſtred, as he did; much depending thereupon, *viz.* God's honour, the bleſſing, proſperity, and ſafety of the country, the piety, juſtice, conſcience, contentation and ſalvation of men. As for

11 H. 7. 12.

Why this juriſdiction given to court ſpiritual. Plow. Com. 279.

1 Cor. 4. 2. Act. 20. 27.

for *wills* proved in *London* and *Oxford* before the mayor, that is only in reſpect of the burgages within thoſe places deviſable; but they were to be proved alſo before the ordinaries in reſpect of the goods, and there only where no lands are bequeathed. The proving then is to be before the ordinary, general, particular or ſpecial. By general, I mean the metropolitan or archbiſhop, before whom it is to be proved; in caſe the teſtator have goods valuable, called *bona notabilia*, in divers dioceſſes whereof he is ſuperior.

Proved in London and Oxford, before the mayor. Vide plea in the Sup. p. 10, 15.

Vide f. proxim. Of Bona Notabilia both in Canterbury and York.

Of bona notabilia.

WHAT ſhall be ſaid to be *bona notabilia* is conſiderable; for thereabout hath been much diverſity of opinion: ſome holding that they muſt be of forty ſhillings value, ſome five pounds, ſome ten pounds; yea, ſome that the value of a penny ſufficeth to draw it to the archbiſhop from the particular biſhop. But that difference of opinion I conceive to be now cleared by a canon made in the firſt year of King *Charles* his reign at a convocation then held, whereby it is eſtabliſhed, that five pounds ſhall be the ſum or value of *bona notabilia*; yet therein is this *Proviſo*, that where by compoſition or cuſtom in any dioceſſes *bona notabilia* are rated at any greater ſum, the ſame ſhall continue not altered. It is likewiſe thereby provided, that if any man die *in itinere*, *viz.* in his journey or travel, the goods which he then hath about him ſhall not cauſe that adminiſtration ſhall be committed, or the *will* proved, before the metropolitan.

Can. 92, 93.

In the Dioceſe of London, it is 10 l. by compoſition. Swinb. 414. Vide poſt. Sup. p. 11.

Canon law made 1 Jac. c. 9. Vide poſt. Sup. p. 27.

Having

Having conſidered of the value, now another point obſervable is, what things ſhall be ſaid to be *bona notabilia*. And as to *that*, debts owing to the teſtator are *bona notabilia*, as well as goods in poſſeſſion, their value being anſwerable: yet, I think if the penal ſum of the bond be but five pound for payment of a leſs ſum, although the bond be forfeited, yet in the ſpiritual court, where reſpect to conſcience ſuppreſſeth the favouring of executors, this will not be taken to be *bona notabilia*, *viz.* of five pounds value, although in law the whole penal ſum be a duty. But if the debt be five pounds or more, though it be deſperate, or due from the King, againſt whom no ſuit can be, but only by petition, yet this will ſtand for, and as *bona notabilia*, as I take it, in the court ſpiritual; though thereabout I can but conjecture, ſince the rules of our law determine it not. And this point, touching the King's being debtor, I find debated in the late Queen's time, but not reſolved, ſo far as I find. But there *Popham* at the bar urged that no debt ſhould be *bona notabilia*; and if it ſhould, yet not ſuch for which no remedy by ſuit, as in that caſe, the Queen being debtor. Yet a farther queſtion local is touching theſe debts or things in action, in what place or dioceſs they ſhall be ſaid to be as *bona notabilia*, *viz.* whether in the place where the debtors be, or where the obligations, or other ſpecialties be? And as to this, the law hath been taken, that becauſe the perſons of the debtors be moveable, paſſant and tranſitory; therefore theſe debts ſhall be ſaid to be, and to make *bona notabilia* where the bonds or other ſpecialties be, and not where the debtors inhabit and dwell. And ſo was it not

Swinb. 418.

21 Eliz.

Goods conſiderable or conſpicuous.

Bona Notabilia where the Specialties be.

not long ſince conceived by Juſtice *Walmſley*, and Juſtice *Beaumont* in one *Pretyman*'s caſe, no other contradicting it. Herein therefore many are miſtaken, who only in reſpect that the perſons of the debtors do dwell in foreign dioceſes, other than the places of the death of the teſtator, or where his other goods were, do take adminiſtration in the prerogative court, though the ſpecialties remained where the party died, or his goods reſidue were. But in caſe the debts be only by contract, without ſpecialty, then indeed they are to be eſteemed *Bona Notabilia*, there and in that place where the debtor is, as the ſaid judges well conceived the difference. But in caſe land be given to executors for payment of debts or legacies, this ſhall not be *Bona Notabilia*, as I take it, though it be *Aſſets*.

Hil. 17 Eliz. M. Com. Da. Vide 13 & 14 E. Dy. 305.

Bona Notabilia where the debtor is.

Of the validity and invalidity of probates.

AS to the third point, we will firſt ſee of what validity an erroneous proof is, and thereabout we ſhall find this difference. Admitting that one hath not *Bona Notabilia* in divers dioceſes, ſo as of right the proving of the will appertaineth not to the metropolitan, and yet the will is proved before him; this is not meerly void, but ſtands in force till it be reverſed by ſome ſentence upon appeal; as was reſolved between *Vear* and *Jeofferies*, in the late Queen's time. But on the other ſide, in caſe one have *Bona Notabilia* in divers dioceſes, or a peculiar and a dioceſe, and yet the will is proved before the particular biſhop within whoſe dioceſe part of the goods are; this is meerly

Not void, but voidable, for that the metropolitan hath juriſdiction over all the dioceſes within his province, and for that cauſe it can't be void, but only voidable by ſentence. Vide poſt. Sup. p. 27. 118.

22 Eliz.

Becauſe by no means he can have juriſdiction of that cauſe which belongeth to his ſuperior.

and utterly void, without any reverſal. So alſo of proving in ſome peculiar. And in caſe one have *Bona Notabilia* both in the dioceſe of *Canterbury*, and in the dioceſe of *York*; the *will* muſt be proved either before both metropolitans, if within each of their juriſdictions there be *Bona Notabilia*, in divers dioceſes; or elſe, as I take it, if there be not ſo in any of the places, then before the particular biſhops in thoſe ſeveral dioceſes where the goods are. Or, if within the one juriſdiction metropolitan the teſtator had goods in divers dioceſes, and in the other but in one dioceſe; then in the one place is the *will* to be proved before the archbiſhop, and in the other place before the particular biſhop, as I conceive. And ſo alſo of peculiar juriſdictions. And in ſome places archdeacons have peculiar, or juriſdiction ordinary, and power to take probates of *wills*, and grant adminiſtrations. But where any like error or miſproving is in theſe reſpects, it is cauſe of reverſal or of nullity, according to the former difference: ſo alſo if there be falſehood in the proof, were it *communi forma*, that is, without witneſſes, or by examination of witneſſes; yet may it in the ſpiritual court be undone, if either diſproof can be made, or proof of revocation of that will was once made, or of the making of a later.

Where one hath Bona Notabilia in both the provinces of Canterbury and York, how proof to be.

Vide poſt. Sup. 51, 153.

Now, admitting the will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the proof or will ſo proved. It being under the ſeal of the ordinary cannot be denied, ſaith one book, to wit, whether this ſhewed forth be a will proved or not; no, though the proof be but indorſed on the back, *viz.* that it is ſo proved, ſaith the Book. But not-

Vide poſt. Snp. p. 9.

9 Ed. 4. 17.
22 E. 4. 50.
22 H. 6. 22.

notwithſtanding, the defendant ſo uſed may deny that the plaintiff is executor, as not being concluded nor eſtopped by the probate ſo to ſay. And the reaſon is, becauſe the ſeal of the ordinary is but matter in fact, and not matter of record: nor are the ſentences of divorce, and the like, in the ſpiritual court, judgments or matters of record, as hath often been held. Plow. Com. 282. 44 Ed. 3. 32. 19 Aſſ. p. 2.

Of the relation of probate and refuſal.

AS for this laſt point, both the proving and the refuſal ſhall have relation to the death of the teſtator, as I take it, to divers purpoſes. So as to the proving, ſaith the Lord *Dyer* expreſly and confidently in *Greysbroke* and *Fox*'s caſe; and the reſolution alſo of the caſe proves it. For there adminiſtration being committed before any *will* proved or notified to the ordinary, as it ſhould ſeem, the adminiſtrator ſold ſome of the goods to *J. S.* and after the executors (proving the *will*) brought an action of *Detinue* for thoſe goods againſt *J. S.* who pleaded this adminiſtration and ſale: and thereupon the executor demurred; and judgment was given for him, as having by the proving of the *will* diſproved the adminiſtration *ab initio*. But it is true that judgment was given only by two judges; one being abſent, and the other diſſenting in opinion; yet I think it was right and according to law, and that refuſal ſhall have the like relation; elſe could not the adminiſtration relate to the death of the inteſtate, as it doth to ſome purpoſes, expreſſed in divers books *viz.* to have an action of treſpaſs for goods taken

Proving. Plow. Com. 281, 283.

18 H. 6. 12. 2. 9 E. 4. 33, 47.

Not to make good a releaſe made before. Co. lib. 5. 18.

Refuſal. 39 H. 6. 8. 2 Ma. Dyer 110.

Vide poſt. Sup. p. 125.

before adminiſtration committed, and to have a rent growing payable in that mean time.

What Fees are to be paid upon probate, or for copies of *wills* or inventories.

Per Stat. 21 *Hen.* 8. cap. 5.

1. *Where the goods amount not to above five pounds, only ſix pence to the ſcribe*
2. *Where they be above five pounds, but under forty pounds,* 2 s. 6 d. *to the* B. B. 12 d. *to the ſcribe.*
3. *Where above forty pounds, to be taken but* 2 s. 6 d. *to the* B. B. 2 s. 6 d. *to the ſcribe, or* 1 d. *for each ten lines of ten inches long, at the ſcribe's choice.*

THeſe ſums are to ſatisfy both for proving, regiſtering, ſealing, writing, praiſing, making inventories, giving acquittances, fines, and all other things concerning the ſame.

Where land is given to be ſold, neither the money raiſed, nor the profits thereof ſhall be accounted as any of the teſtator's goods or chattels, ſaith the ſtatute.

Note, That the *will* is to be brought with wax thereunto ready to be ſealed, and proof to be made of the *will* according to common cuſtom.

How the inventory to be made.

For making the inventory, the executor is to take or call to him two creditors or legatees of the teſtator, and do it in their preſence; or, in their abſcence or refuſal, two honeſt perſons being

being the next of his kin; or in their default, two other honeſt perſons.

The inventory is to be indented, and one part left with the ordinary, and the other to remain with the executor.

The executor is to make oath for the truth of it.

For a copy deſired by any, either of a *will* or inventory, no more is to be paid than before is allowed for the regiſtring; with the like election to the ſcribe or regiſter, as is aboveſaid.

Mr. *Swinburne* ſaith, that an executor is to ſwear, that if it ſhould be thought fit, to be bound to make a true account, when he ſhall be thereunto lawfully called by the ordinary. Of this account ſee in page 274. And of accounting ſome books of the common law make mention, as 13 *Edw.* the third, *Fitzherbert Exec.* 91. where *Trew* ſaith, that of a thing in action no account ſhall be before the ordinary; but *Parning* ſeems of a contrary opinion. And elſewhere it is ſaid, that where a debtor is made executor to the debtee, he ſhall yet account before the ordinary for his debt: yea, as of money in poſſeſſion, ſaith one; which others denied.

An executor by wrong ſhall be drawn to account before the ordinary, ſaith *Moyle* Juſtice. But ſaith *St. German*, he may not force any to account againſt the order of the common law; (not ſhewing what that is.) And *temp. Edw.* the fourth, it is ſaid, at leaſt by the reporter, that after the *will* proved, the ordinary hath no more to do: *quod non credo.*

Alſo of the oath of an executor divers books teil, but not to ſuch purpoſe as *Swinb.* but truly to perform the *will.*

See alſo 31 E. 3. cap. 11. An adminiſtrator ſhall account as an executor, Fit. Ex. 91. & 837. viz. 1 E. 2. tit. Briefe. 48 E. 3. 14. 15. Of a duty reſting in account it is ſaid, the legatee ſhall have remedy by account in the ſpiritual court. 18 Ed. 4. f. 3. Moyle. 4 Hen. 7. 15. per Wood. 9 Ed. 4. 47. Doct. & Stu. 78. b. 21 E. 4. 22. 1 Iowd Com. 544. 4 H. 7. 16 Kielw. Rep. 64, a.

And now by *ſtat.* 4 *Ann. c.* 16 *ſec.* 26. The probate of *wills* and adminiſtrations ſhall be in the ordinary of the dioceſe, for perſons working in the King's docks or yards, and the wages due to them ſhall not be deemed *Bona Notabilia.*

CHAP. V.

What things ſhall come unto executors, and be Aſſets *in their hands and what not.*

THE things which ſhall come to executors are of great multiplicity, and would make a large and confuſed heap if tied together in one bundle or lump. I will therefore divide and ſort them out in parts, after the beſt manner I can. Firſt, we will divide them into things poſſeſſory, or actually in the teſtator; and things in action, or not actually in the teſtator. Secondly, the poſſeſſory into chattels, real and perſonal; or (as ſome leſs properly expreſs it) moveable and immoveable.

Of chattels real poſſeſſory.

THeſe may be divided into two kinds, *viz.* living and not living. The living are not many and various. 1. The wardſhip of the body of another (be it by reaſon of a tenure of the preſent owner, or by aſſignment from the King or other lord of whom the tenure was) is a chattel real, not perſonal, though it be an intereſt in the perſon of another; but it is in reſpect

ſpect of a tenure of land, or other hereditament, and is for years, *viz.* during the minority, or till marriage had, and ſo is real. Next, a villain for years (as by grant for a term from him that had the inheritance) is a chattel real. As for an apprentice for years, it is by cuſtom, as I take it, that he goeth or is derived to executors but for reaſon after ſhewed, I think this intereſt is not in the realty, but in the perſonalty rather, So of a debtor in execution for debt, the intereſt in him, or perhaps more properly in his liberty, is not, as I conceive, (for reaſons which after I ſhall expreſs) a real, but a perſonal chattel. The like law of a priſoner taken in the wars. As for fiſhes in a pond, conies in a warren, deer in a park, pigeons in a dove-houſe, where the teſtator had the inheritance, or but for life, in the pond, warren, park and dove-houſe, they are not chattels at all, nor go to the executors, but to the heir with the inheritance. If the teſtator were but a termor, they are to go to the executor, but as acceſſary chattels, following the eſtate of their principal, *viz.* the warren, park, dove-houſe, pond, *&c.*

If kept in a trunk or cage, &c. they go to the executor. Vide infra p. 57. Cro. Eliz. 372.

The real chattels not living, are either in houſes or lands moſt uſually, and that three ways: firſt by leaſe for years: ſecondly, by wardſhip of lands held by knights ſervice: thirdly, by extent upon judgments, ſtatutes or recognizances; or in things iſſuing out of houſes or lands, as rents, commons, eſtovers, or ſuch like. But where an inheritor reſerves rent upon a leaſe for years, this ſhall not go to the executor, but to the heir, with the reverſion, other than arrearages of it behind at the death of the

Rent reſerved goes with the reverſion, ſave the arrears.

teſtator. Alſo commons, corodies for years, advowſons, tithes, fairs, markets, profits of leets, and ſuch like, which the teſtator had for years, all which may accrue any of theſe ways, as the firſt, are chattels real. Yea, one ſimple preſentation to a church upon the next avoidance is a real, and not perſonal chattel, before it come to be void; and what then it is we ſhall after ſhew. And the title accrued to the crown upon attainder of felony, where the party held not of the king, *viz.* the *Annum, Diem & Vaſtum*, that is, power not only to take the profits for a year, but to waſte and demoliſh houſes, and to extirpate and eradicate trees and woods, is but a chattel; and therefore though granted to one and his heirs, by the King, yet ſhall go to the executor, and not to the heir.

If held of the King the whole is forfeit.

Tem. E. 1. Aſſize 124. Fitz.

Some doubtful or leſs clear caſes touching chattels real.

FIrſt, where we ſpeak of wardſhip, it is not to be underſtood of wardſhip by reaſon of ſocage tenure, for *that* goeth not to the executor, but he ſhall be next guardian who now, after the death of the firſt guardian, ſhall be next of kin, if the ward continue under fourteen years old; elſe he is out of wardſhip. Secondly, if one have a leaſe for three lives to him and his aſſigns, this is no chattel, nor ſhall go to the executor, nor to the heir, but to him who firſt enters and claims it as an occupant, if no aſſignment be in the life of the leſſee made: contrarily of a leaſe for many years, if three, or more, or leſs, ſo long live, this is a chattel, and ſhall go to the executor. So an extent upon

32. Aſſ. p. 11. Such eſtate purauter, vie, is now deviſeable by ſtature.

Extent goes to the executor.

a ſtatute, yet it is delivered to the party as a free-hold, *viz. ut liberum tenementum*; but that only makes it to be *quaſi liberum tenementum* as to the maintaining of an aſſiſe, if wrongfully put out. Where one is ſeiſed in the right of his wife of land, or other hereditament, and is attainted of treaſon or felony, the profit thereof accruing unto the crown is but a chattel; and though the King grant it to one and his heirs, yet it ſhall go to his executors. And if one having a leaſe for many years, *viz.* 100, 500, or more or leſs, doth deviſe and bequeath the ſame to *A.* and the heirs males of his body, and for want of ſuch iſſue to *B.* and the heirs males of his body, and dieth, having iſſue a ſon; the term ſhall not go to his ſon, but to his executor or adminiſtrator; for it cannot be made a matter of inheritance. So if *A.* had died without iſſue male, the term ſhould not have gone or remained to *B.* but to the executor or adminiſtrator of *A.* as was lately adjudged in the exchequer between Sir *Robert Lewknor* and Mrs. *Hamond.* So of an advowſon, or any other hereditament, granted or deviſed to one and his heirs for 100 years: or if ſuch a term or grant a rent out of the land to *A.* and his heirs, or the heirs or heirs males of his body; yet ſhall the ſame go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is it ſelf a meer chattel. *Partus ſequitur ventrem.*

4 E. 3. Aſſ. 166. Bro Chat. 15.

A term can't be entail'd. Vide poſt Sup. p. 173, & 174.

39 E. 3. 37. So Manwood, if granted for life, it is but a chattel. Plow. Com. 524.

Of chattels perſonal.

PErſonal chattels, or goods moveable, are alſo in like manner to be divided into quick or dead. The quick are cattle of all kinds;

as ſheep, horſes, kine, bullocks, ſwine, goats, geeſe, ducks, poultry, *&c.* There may be alſo in living creatures reaſonable an intereſt, as in a chattel perſonal; as in the perſon of a man taken in execution for debt. And this I hold to be in nature not a real, but a perſonal chattel, (as before was touched) for that debt is the root of it, and the body is but a pledge or gage, diſchargeable inſtantly upon payment, releaſe, or other diſcharge of the debt. Like law of a priſoner taken in the wars; for thereof and therein, as in a chattel, hath the party a legal intereſt: as appears by a writ of treſpaſs in the regiſter for taking away a priſoner, *viz. Quare quendam Scotum priſonarium ſuum cepit, &c.* And note lately, *viz.* in the time of King *Hen.* the eighth, the King himſelf, upon the winning of *Boulogne*, bought divers priſoners of his ſubjects. And by a ſtatute in the beginning of *Hen.* the ſixth his time, this intereſt in a priſoner is mentioned as valuable, and coming from one King unto another; therefore, doubtleſs ſhall go from teſtator to executor by death, and not to be infranchiſed or freed thereby. The intereſt which one hath in an apprentice I take to be rather perſonal than real, though for years, becauſe not ſpringing out of any real root, as wardſhip and villainage do, but out of a meer contract. As for a ſervant whoſe maſter is dead, doubtleſs he is legally diſcharged, and is not ſervant either to heir or executor: but meet and honeſt it is that one of them continue him in ſervice, till a fit time of providing for him a new maſter; and fit for him, not to depart ſuddenly.

No Na. Br. 88. Reg- orig. f. 102. There it is mentioned, that the priſoner was to pa 159 l. for his ranſom. Bro. no, cap 295. & tit. Property 38.

1 H. 6. c. 5.

Apprentice,

Servant.

Now for things perſonal without life, theſe are evident, *viz.* all houſhold-ſtuff, impliments and utenſils, money, plate, jewels, corn, pulſe, hay, wood felled and ſevered from the ground, wares, merchandize, carts, plows, coaches, ſaddles, and ſuch like moveable things.

More doubtful caſes touching things perſonal.

FIrſt, touching things living, if the teſtator had any tame pigeons, or deer, or conies, or pheaſants, or partridges; theſe as well as chickens, ſhall go to the executors: ſo, though not tame, if they were taken and kept alive in any room, cage, or like receptacle, as pheaſants and partridges often be; ſo fiſh in a trunk, as alſo young pigeons, though not tame, being in the dove-houſe, not able to fly out; yet their dams, the old ones, ſhall go to the heir with the dove-houſe. And if the teſtator had any reclaimed hawks, they alſo as chattels perſonal ſhall go to the executor, becauſe they are things commonly vendible. And whereas hounds, grey hounds and ſpaniels be not ſo commonly bought and ſold, nor ſo anciently have been; yet they are now grown to be a merchandiſe; and why not? For although they be for the moſt part but things of pleaſure, that hindereth not but they may be valuable, as well as inſtruments of muſick, both tending to delight and exhilarate the ſpirits; a cry of hounds hath to my ſenſe, more ſpirit and vivacity than any other muſick. Add hereto, that there may be ſome profit and advantage gotten by them both *quoad adeptionem boni, & ademptionem mali,* the getting of ſome food, and the preſerving of others,

10 E. 4. 14, 15. Come of wild ones.
22 H. 7. Kelw. Rep. f. 88. 118. Co. 11. f. 50.
18 H. 8. 2. Cro. Eliz. 372.
10 E. 4. 14, 15, and 18. So of young hawks in the neſt. It is felony to ſteal theſe; ergo, they be goods.
3 Inſt. 98. 109.
Vide poſt. Sup. p. 181.
So a hunter's horn, a faulkners's lure.
Hare's deer, pheſants, partridges, wild-ducks, &c. are good meat.

others, as lambs, conies, fiſh, poultry, by killing foxes, wild cats, and others, which deſtroy them. And we know that money is recoverable in damages for taking away ſuch, or a maſtiff ſerving to keep an houſe; ſo of ferrets to catch conies, *&c.* Therefore they are valuable. But it may, perhaps be objected, that none of theſe above are cattle, and therefore not repleviſable, conſequently, no property in them; for when more than one living cattle is diſtrained, the replevin is to be by the name of *Averia*, ſignifying cattle. For anſwer, not to inſiſt that one may have property in divers things whereof no replevin lieth, as corn or hay not in ſacks nor carts, money not ſhut in bag or box, *&c.* I further ſay, that even the word *Averia* may be applied to theſe: for ſo I find it to hens and capons in the book of entries, *viz.* in the writ
Fol. 142. of *Curia claudenda*, where the plaintiff complains of the defendant's not making his mounds, *per quod Averia ipſius* A. *viz.* Capons and hens, and other his cattle, came into the plaintiff's houſe and garden, to his damage, *&c.* And both *Newport*, and *Newdigate* held that a writ of re-
Hen. 8. f. 3. plevin lieth for ſuch things. Though *Brudenel* was of a contrary opinion, yet he alſo held an action of treſpaſs maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and firſt to thoſe abroad in the fields. Put the caſe, that a man dies in *July*, (before harveſt I mean) ſeiſed for life, or in fee or tail, in his own right or his wife's, or eſtated for years of land in the right of his wife, being ſown with corn or any manner of grain, the common ſaying is, *Quicquid plantatur ſolo, ſolo cedit:* yet this

this ſhall go to the executor of the huſband, and not to the wife or heir, who ſhall have the land, but hay, growing, *viz.* Graſs ready to be cut down, apples, pears, and other fruit upon the trees, ſhall go to the wife; as alſo if they had been upon a man's own land of inheritance, they ſhould go to the heir, though the corn ſhould go to the executor. The reaſon of the difference is, becauſe this later comes not meerly from the ſoil without the induſtry and manurance of a man, as the other do: and I take hops, though not ſown, if planted, and ſaffron and hemp, becauſe ſown, to pertain as corn to the executor. All thoſe yet ſhall paſs to one to whom the land is ſold or conveyed, if not excepted, though never ſo near reaping, ſelling or gathering. But what if the wife had the leaſe for years, as executor to ſome former huſband or other friend, and the huſband after ſowing dies; who then ſhall have the corn? Certainly the corn ſhall go to the executor of the laſt huſband, at leaſt ſo much as is more than the year's value of the land, or the making it up by addition of other things; for the value is to be *Aſſets* for payment of debts and legacies. Put the caſe again, that the huſband and wife were joint-tenants of the land; then the very corn growing ſhall ſurvive to her, together with the land; and though the huſband ſowed it, yet ſhall it not go to the executor. Being in conſideration of things growing on the ground, let us not forget to think of trees ſold by *J. S.* ſeiſed of the inheritance of the land to *J. D.* who died before felling; this intereſt is a chattel, which ſhall go to the executor, and not to the heir of *J. D.* but ſome colour may be that

Roots of carrots, parſnips, land ſown whereon is ripe corn.

Vide poſt Sup. p. 72.

For he was tenant for life in effect.

The wife alſo ſhall have convenient apparel. 33 H. 6. 31. 2 Eliz. Dyer.

that theſe, becauſe fixed to the ſoil and freehold, are real chattels, as the intereſt in land is, and not perſonal. So alſo of trees excepted by him who ſelleth the inheritance of the land. But in both caſes I conceive this intereſt to be perſonal, and not real; for that, as it is a property of a chattel in the vendee or vendor with exception, it ſtands in conſideration ſevered and abſtracted from the ſoil or ground where the trees grew, though the trees be not actually ſevered by the axe from their mother earth. But if the leſſor for years or life do eccept the trees, theſe continue parcel of the freehold and inheritance. And after corn reaped, and before the tithe ſet out, the inheritor of the tithe dying, I think the executor, and not the heir ſhall have the tithe after ſet out.

Co. l. 1. 38.

Of houſes, or things about the Houſe. 43 E. 3. 6.

Now let us come home to the teſtator's houſe, and ſee in and about it. Some doubt what pertains to the heir, and what to the executor. A queſtion hath been of old, and of late, touching coppers, leads, furnaces, fats for dyers or brewers, pales, rails, glaſs in windows, tables, dormants, wainſcots, doors, locks, keys, and ſuch like, to whom theſe ſhould go, whether to the heir or executors. And in the latter end of *Hen.* the ſeventh his time, an executor taking a furnace which was ſet in the middle of a houſe, and not fixed to any wall, the heir brought an action of treſpaſs againſt him for ſo doing; and it was adjudged for the heir, *viz.* that this was to go as part of the freehold and inheritance to the heir. And long before in *Edw.* 3d. his time, it was debated, whether it was waſte in a leſſee to remove or take away a furnace, or not: but I find no opinion delivered

21 H. 7. 21.

12 Ed. 3. f. 6.

red by the judges. But in the late Queen's time, Juſtice *Walmſley* ſaid that the Lord *Dyer*'s opinion was, that where the furnace is not fixed to the wall, the leſſee might within his term take it away. Contrarily, if it were fixed to the wall; for then it ſtrengtheneth the houſe. And yet, notwithſtanding it might be in the one caſe ſo removed by the leſſee, yet it is not there, as he ſaid a chattel perſonal or moveable, ſo as it is attachable. And there the caſe being, that a clothier being a termor of an houſe, had fixed a copper to the wall, with looms and bricks neceſſary for his occupation; a judgment being had againſt him, the ſheriff delivered the copper in execution as a chattel, and after the leſſee took it up, and it was taken from him by virtue of the execution; whereupon he brought an action of treſpaſs; and by all the judges the action was maintainable. And whereas it was found by the jury, that by the cuſtom of *Kent* the leſſee might remove ſuch a copper; Juſtice *Beaumont* ſaid, that without any cuſtom a leſſee might ſo do at any time during his term. But it is to be noted in the ſaid caſe, that the furnace was by itſelf delivered as a movable chattel, and not as part of the houſe; for that was not meddled withal, nor at all delivered in extent, (as in the caſe between *Miles* and *Prat*, where both houſe and copper were delivered upon a ſtatute) the houſe belike being held upon ſuch a rack-rent, as that the party did not deſire to have it; for he might have had the whole being a chattel, and ſo have uſed the copper during the term. And as touching all other fixed things, the law was taken in the ſaid caſe in *H.* 7. his time to be all one as in the

H. 37 Eliz. Auſtin's caſe.

the caſe of the furnace, *viz.* that they ſhould go to the heir; ſave only that for glaſs in the windows, *Pollard* ſaid it was otherwiſe, *viz.* that that ſhould go to the executors, which none there denied. But ſince, in the late Queen's time it was otherwiſe reſolved touching glaſs, that it ſhould not go to the executors, and the like was there ſaid touching wainſcots, and ſo alſo by the Lord *Anderſon* in the ſaid caſe of *Auſtin.* And touching poſts fixed, for that they be parcel of the freehold; ſo alſo of mill-ſtones, anvils doors, keys, windows, none of theſe be chattels, but parcel of the freehold, or thereto pertaining, therefore not to the executors.

Co. lib. 4. f. 93. 94.

Things in gardens.

Now to come to gardens alſo: whereas I before laid down a difference betwixt things ſowed, or not ariſing from the earth without manuring, and ſuch as grow of themſelves; it will thence be concluded that the roots of carrots, parſnips, turnips, ſkerrets, and ſuch like, coming and ariſing from yearly ſowing, muſt go to the executor, and not to the heir; the caſe being ſo, that the gardener and ſower had the inheritance of the garden or ſoil. Now though in moſt places this can rarely be a queſtion of value, yet about *London* and ſome great towns it may, and therefore is not unworthy of a line or two, a thought or two, and the rather for that the reaſon of this caſe may give light touching right in other caſes. And, in my opinion, theſe (notwithſtanding there is a ſowing and manurance to generate them and cauſe their being) ſhall go to the heir, and not to the executor, My reaſon is, for that the thing of profit is the root which is hidden in the ground; I hold it no reaſon, nor agreeable to the law, that the exe-

executor ſhould dig and break the ſoil and ground to ſearch for her intrails: he is to content himſelf with that which is above ground; as melons of all kinds, and the like, whoſe fruit is above the ground; but as for artichokes, though the fruit be above the ground, yet I think they have not ſuch yearly ſetting or manurance as ſhould ſever them in intereſt from the ſoil, therefore they ſhall go with it to the heir.

Let us now conſider of things, though not fixed to, yet uſually kept in houſes, *viz.* writings and evidences, whereabout generally no doubt can be, but that they follow the intereſt of the land: ſo as if they touch inheritance, they pertain to the heir; if but terms of years, goods, chattels or debts, they pertain to the executor: yea, ſo do ſtatutes and bonds in law (howſoever otherwiſe in equity) though they concern the aſſurance and enjoying of inheritance purchaſed. What if *A.* mortgage the inheritance of lands to *B.* upon condition of redemption by payment of five hundred pounds to *B.* his heir or executor, and *B.* dieth, the deed being delivered into his hand? now the heir, not the executor ſhall have them: for though the money may be paid to the executor, yet (mean-time) the land deſcends to the heir, nor is there any debt to the executor, for *A.* may chuſe to pay, or not. Put it on the other ſide, that the land had been ſold for five hundred pounds not paid to *A.* but a condition, that if not paid to him, his heir or executor, by ſuch a day, then to re-enter; and *A.* dieth: here is a debt to the executor, and no land deſcended to the heir of *A*, yet ſhall the heir have the deeds, for that a condition

dition is descended to him. Question hath been touching boxes and chests wherein the evidences concerning inheritance are: and although the better opinion in our books doth pitch upon this difference, that where they are sealed up, they shall pertain to the heir, otherwise, where not sealed; I cannot conceive that difference to be grounded on good reason, but rather think that boxes which have their very creation to be the houses or habitations of deeds, should, as appurtenant to them, go to the heir, whether sealed or not. On the other side, chests made for other uses, *viz.* the keeping of napery or apparel, shall not, as I conceive, be taken as appurtenant to evidences, because some be in them, for so may other things also be: nor as touching them can sealing be of any effect, but rather locking and not locking must make the difference touching them, if any difference by inclosure.

41 E. 3. 2.
36 H. 6. 26.
18 Ed. 3. 4.
3 H. 7. 15.

Quær. If sole use, that may make a difference or not.

CHAP. VI.

Of things not actually in the testator, but accruing to the executors by or after the testator's death.

THese be of divers sorts: the first and chief whereof are things gotten and acquired by action or suit; secondly, by condition or covenant without suit; thirdly by remainder.

Of

Of things in action.

TO ſpeak firſt of the firſt, it is clear that debts due to the teſtator, be it by bond, ſtatute or judgment, or for arrearages of rent, are not *Aſſets* to charge the executor until receipt of them: and it is clear that the action to recover theſe doth pertain to the executor, and that the debt and damages recovered ſhall be *Aſſets* to charge the executor. So alſo of actions of *Detinue* and of covenant for any thing perſonal, or any chattel real, leaſe, wardſhip, or the like. But perhaps ſome will doubt of covenant touching inheritance, *viz.* the aſſurance of lands, or enjoying thereof free from this or that incumbrance, or the like: Yet even in thoſe caſes, if the covenant were broken in the teſtator's life-time, I think clearly the action is accrued to the executor, for that his teſtator was to recover damages in the action of covenant for that breach; and he being intitled to theſe damages as principal, and not any acceſſary thing in that action, the law hath caſt that action upon the executor. And that is the cauſe why, if waſte be committed in the life of the leſſor by his leſſee, and then the leſſor dieth, his heir can have no action for this waſte, *viz.* becauſe he cannot recover the treble damage; ſo neither can the executor have it, for that he cannot recover *locum vaſtatum*, the place waſted, the inheritance whereof is in the heir.

Vide poſt. Sup. 75.

A church of the teſtat. inher become void in his life comes to the exec. as a thing in action; but is not Aſſets, for not vendible.

That the executor at the common law could not maintain an action of treſpaſs for goods of his teſtator taken away in his life-time, ſeems to be implied by the ſtatute in the time of *K. Edward*

11 H. 4. 22. 45 E. 3. 3. No. Na. Br. 596. 4 E. 3. c. 7. 4 Ed. 3. c. 7. gives the action to executors.

ward the third, which gives ſuch action. Yet it ſeems that a replevin was maintainable by the executor, at leaſt in ſome caſes, for goods taken or diſtrained in the teſtator's life-time. But in caſe the diſtreſs were for rent or ſervice, it is ſaid, a little after making of that ſtatute, that the lord may not now avow for his rent or ſervice, becauſe his tenant is dead, but muſt ſet forth the matter, and thereupon juſtify to excuſe himſelf from anſwering damages; and the executor ſhall by this action recover the cattle or goods, and that by the common law, ſaith the book, though the ſtatute of *Marlbridge* had never been made, for that the propriety remained in the teſtator. Note; it ſpeaks not at all of the ſaid ſtatute of 4 *Edward* the third. But *Newton*, in the time of King *Henry* the ſixth, would have it, that the executor in that caſe ſhould not have a replevin, but an action of treſpaſs grounded upon the ſaid ſtatute, *viz.* 4 *Edward* the third, which methinks cannot be by any means, by reaſon of the ſtatute of *Marlbridge*, cap. 3. *Non ideo puniatur dominus, &c.* for the executor, as well as his teſtator, is thereby reſtrained, as I think, from the action of treſpaſs againſt the Lord. * As for that no avowry can be made upon the tenant, that is now remedied by a late ſtatute. The other ſtatute hath been taken to extend to other things than goods moveable: for where a church becoming void, a ſtranger preſented thereunto wrongfully

And the like given to executors per ſtat. 25 E. 3. c. 5. 17 E. 3. Fit. 106.

25 Ed. 3. c. 5. gives ſuch action to executors of executors.

C. 21. meant, ut credo 21 H. 6. 1. But Markham e contra.

21 H. 8. c. 19. 4 E. 3. The B. of Coven. and L. and Sale's caſe, M. 32 & 33 El in Com. Ban. So of raviſhment, de gard. 7 H. 4. 2. & 7 H. 4. 6. Eject. Firm. & de clauſo fracto meerly it lieth not.

* By 21 H. 8 c. 19. In replevin the avowry or conuſance may be made upon the lands, without naming any certain perſon to be tenant thereof.

wrongfully, and the patron died; it was resolved in the late Queen's time, that the executor might by the equity of the said statute maintain a *Quare Impedit.* But whether an action of trespass lieth for an executor against him who spoiled the testator's corn, grass or wood growing, hath been questioned, but no where resolved to my knowledge. I think it may lie with some difference. First, for that the statute of 4 *Edward* the third doth not only speak of goods carried away, as limiting the law to that trespass solely and particularly, but speaks generally of trespass done to testators; and then brings in that particular of goods, as one instance. Now there may be many cases of instances or ensamples given in acts of parliament, which yet do not restrain the remedy or purview to that particular, or for extending to other cases of like nature. Thirdly, the statute speaks of trespasses remaining unpunished, which it meant to redress: But it should still leave many unpunished, if it should have no larger extent than to that one singular trespass of goods taken away, *viz.* moveables. Again, the testator was clearly entitled to a recovery of damages for this other trespass, which if he had recovered, should have come to his executor: Yea, the things themselves, all, if felled in the testator's life, and part, though not felled, should have come to the executor; therefore all the damages recoverable in lieu thereof, out of which (recovered) the debts and legacies of the testator are to be satisfied. Beside, this action of trespass is a thing severed from the state of the land, so as if the owner thereof had, after this trespass done, aliened the land, yet had not this action

11 H. 4. 3. This Periam Just. did very judiciously urge in Sale's case supra. The words of the act are, executors shall have an action for a trespass done to their testator, as for his goods and chattels carried away in his life, and shall recover their damages, &c.

remained to him, as I take it clearly. And why not as well as where a treſpaſs is done upon the lands of the leſſee, and then the term expires? This doubtleſs doth not take away his action, nor his executors. But methinks here may be ſome differences probably taken: as firſt, between a treſpaſs in deſtroying or taking away corn growing, and a treſpaſs in graſs or wood growing. For the firſt being of that nature, as that, though the owner had a'ſtate of inheritance in the land whereon it groweth, and ſhould have died before ſeverance and felling, yet it ſhould have gone to the executor, and not with the land to the heir; therefore doubtleſs doth the action for deſtroying or taking away thereof accrue by the operation of law to the executor, in lieu of the thing taken or deſtroyed. Otherwiſe, perhaps, of wood or graſs, which by the owner's death ſhould have gone to the heir, and not to the executor. And yet here again another difference, methinks, may be betwixt graſs and graſs, *viz.* betwixt that in paſture and that in meadow, yearly mowed and turned into hay, not left to be conſumed by the mouths of beaſts, as that growing in paſture: For as the law diſtinguiſheth between theſe ſoils, it gives precedency to meadow, and makes it waſte for a leſſee to plow it up, not ſo for paſture. Yea, tythe is paid of hay, but * not of graſs growing in paſtures: ſo the meadow graſs, being in the owner's purpoſe and intention as a thing ſevered from

* Tythe of Agiſtment is payable for depaſturing unprofitable cattle upon graſs growing in paſtures. *Bunb. Rep.* 1. 3.

from the ſoil, ſhould, methinks, ſo be alſo in the eye and eſtimation of the law, and therefore ſtand in a different ſtate and account from paſture graſs.

A third difference may be in the manner of the treſpaſs, *viz.* Where meadow graſs is eaten up with cattle by a treſpaſſer, and where by him mowed and carried away as hay: for in this later caſe an action of *Trover* and *Converſion* for ſo many loads of hay is doubtleſs maintainable by the executor; though it ſhould be admitted that in the other caſe, of conſumption by the mouths of beaſts without ſeverance, no action ſhould be maintainable by the executor; which yet I admit not, but think the contrary probable.

For when meadow-ground, which yearly conceiveth, (*Sol ſine homine generat herbam*) ſhall be ready to be delivered of her burthen, if a ſtranger put in a herd of cattle, which ſwallow up and tread down this fruit of her womb before the mower with his ſcythe come as a midwife to help her delivery, if then by the haſty death of the owner, before action brought, this great treſpaſs ſhould be diſpuniſhable, it were contrary, as methinks, to the purpoſe of the ſaid ſtatute, and a great defect in the law.

At leaſt, methinks, action upon the caſe here and before ſhould be maintainable.

Yet here, perhaps touching this, a fourth difference may be or ariſe out of the time of the death of the owner, *viz.* where he died before time of mowing, and where not; for *dato* that in the former caſe, becauſe, if ſuch deſtruction or conſumption had not been, yet the owner dying before ſeverance, this ſhould not have come to the executor, but have gone with the ſoil to the heir, that therefore the executor

who is not damnified, ſhould recover no damages. Yet in the other caſe the owner living till after hay-time clearly paſſed, *viz.* till the end of *Auguſt*, methinks now, ſince this fruit of the meadow's womb ſhould have been a chattel ſevered, had not this treſpaſſer made unlawful prevention; therefore the execution to whom the ſame ſhould have come towards the performance of the will, ſhould have out of the ſaid ſtatute, an action and remedy reached unto him to recover recompence in damages for this wrong done *in retardationem executionis teſtamenti.*

A fifth and laſt difference may perhaps be in the ſtate of the owner: for *Poſito* that where the land is his freehold or copyhold inheritance, no action ſhould be given to his executor for wood or graſs taken or deſtroyed in his life-time; yet where he is but tenant for years, guardian, or tenant by extent, ſo as the very 'ſtate in the land was to come, and is to come to the executor, (together with *quicquid plantatur ſolo*) methinks the executor ſhould have, together with the 'ſtate in the ſoil, the action to puniſh the robber of, or treſpaſſer upon the ſoil. Thus having ſcanned and ſifted to the beſt of my ability, all differences and circumſtances of this point, how far I am wide, and wherein right, *Aliorum ſit judiciam*, or rather, *Altioris eſto judicii.* But this is clear, that whereſoever executors do recover any damages for treſpaſs or other wrong done to their teſtator, the money recovered (at leaſt if execution be had, or money received) will be *Aſſets* in their hands, as well as debts recovered upon bonds, or bills, or lands by them taken in extent upon ſtatutes, recognizances or judgments. Yea, without ever having theſe monies, execu-

3 H. 6. 3. Little. f. 84. a. So held in Sale's caſe of damages in Qua. Imped. recovered. Contra of the preſentment, releaſing.

13 Ed. 3. tit. 91.

executors may make them *Aſſets* in their hands, *viz.* by making releaſes or acquittances, or acknowledgment of ſatisfaction; for this amounteth to a receipt, and chargeth the executors towards the creditors with the whole penal ſum, though haply they receive but part, as the principal, or ſome like proportion.

Therefore there is great caution to be uſed by executors in this kind, that unleſs they be ſure they have goods ſufficient to pay all debts and legacies, they make no releaſe, acquittance, or acknowledgment of ſatisfaction, for more than they receive, be it debt or damages.

And the like caution is to be uſed by them touching ſubmiſſion of debts or damages to arbitrement, whereby diſcharges of the ſame may grow: for the ſubmiſſion to the arbitrement being their voluntary act, although the arbitrators by their judgment do diſcharge the debt or damage in part, or in whole; yet ſhall the creditors have like remedy thereupon againſt the executors as if they had releaſed, or, which is more, received the ſame.

Error 13 H. 4. 6.
46 E. 3.
Yet upon a verdict in Qua. Imped. the wife not the executor of the huſband did ſeiſe.
9 H. 6. c. 4.

Other actions there be of diſcharge, which as the teſtator himſelf in his life-time might have had, ſo may his executor after his death, *viz.* Writ of error, attaint, diſceit; *Audita querela*, *Identitate nominis*. But this laſt is given by ſtatute. Whatſoever is regained by any of theſe ways as unduly loſt by the teſtator, ſhall alſo be *Aſſets*.

Special caſes pertinent to the premiſſes.

1. *Chattels come to the executors from the teſtators, yet not* Aſſets. 2. Aſſets *which be no chattels.* 3. *Things in action, and in the perſonalty, turned into chattels real,* & e contra.

AS to the firſt, I exemplifie thus: *A.* makes *B.* his executor, and dies; *B.* makes *C.* his executor, and dies: the goods left by *A.* to *B.* as executor far exceed his debts and legacies. Or let us ſuppoſe no debts nor legacies of *A.* and that *B.* dieth much in debt above the goods he leaveth, and did make no alteration of the property of the goods of *A.* but meerly left them to *C.* his executor. Now ſhall not the goods which came to *B.* as executor of *A.* and ſo from *B.* to *C.* be liable in law to pay the debts of *B.* yet in conſcience methinks they ſhould, and that *C.* ſhould not receive them to his own uſe, as in law he may, where *A.* left no debts. But if *A.* making *B.* executor, did alſo by his will give him all his goods, and he in his life-time made election to have them as legatee, or by his will did ſo diſpoſe of them, or appoint them to go, as the goods he had as executor; they could not be otherwiſe given or diſpoſed. Now by this election they were altered in property from being his as executor, and ſo as his own goods ſhould be liable to his debts. But things in action could not be ſo given or diſpoſed, *viz.* Debts, *&c.* Yet if *D.* were indebted to *A.* one hundred pound, and *A.* his executor took

Or if a ſtranger uſurp in his life, and he dying his executor recovers in a Qua. Imped. 10 Com. Ban.

as by Sale was done infra, Mich. 32 & 33 Eliz. So held in Sale's caſe, Vendere jure poteſt, emeret ipſe prius.

took a new bond of him, or another for it, giving up the old bond; now was it become his own debt, and ſo ſhall ſtand in his executor.

Another inſtance of this, thus: if *A.* patron of the church of *D.* grant to *B.* the next avoidance, the church becomes void, *A.* dies before he preſents, his executor preſents, and hath the benefit of preferring his ſon or friend; yet ſhall this make no *Aſſets* in his hands for payment of debts, for that he could not lawfully take money to preſent. But if *B.* had died before the church had become void, then, becauſe the executor might lawfully have ſold it, the value ſhould be *Aſſets* in his hands, as I conceive; except perhaps the incumbent had died ſo haſtily after *B.* that the executor had not time convenient to find out a chapman and to ſell it.

If in the other caſe a ſtranger had preſented, and got his clerk admitted; and the executors of *B.* had in a *Qua Imp.* recovered damages; the money ſo recovered ſhould have been *Aſſets.* Thus much of the firſt, *viz.* that ſome things of the nature of chattels may come to executors, and yet not be *Aſſets.*

Touching the ſecond, *viz.* that ſome things may be *Aſſets* in the hands of executors which yet are no chattels, I ſhall give but two inſtances. Firſt, where a man leaveth a villain for years to his executors, and the villain purchaſeth land in fee-ſimple, and the executor entereth into the land; now hath he fee-ſimple therein, and this land is *Aſſets* for payment of the teſtator's debts. So if a man by his will give lands in fee to his executors, to be ſold for performance of his will; theſe (before the money thereby raiſed) are *Aſſets* both for payment of debts

22 H. 8. Br. Villainage, 46. If he die, how ſhall this be Aſſets in the heir.

3 H. 3. 63. and ſo 2 H. 4. 21. If by feoffment, Per Markham Cap. Juſt. con. Rickhall.

debts and of legacies. But if the lands had been given to be ſold only for payment of debts, they ſhould only be *Aſſets* for that purpoſe, and not for payment of legacies: and ſo if it were expreſſed to be for payment of legacies ſingularly, this ſhould not be *Aſſets* for debts, as I take it. For ſince theſe are not *Aſſets* of their own nature, but ſo made by the *will* and diſpoſition of the teſtator; methinks they cannot be otherwiſe nor farther *Aſſets* than as the teſtator hath willed and diſpoſed. But though lands thus given were *Aſſets* before the ſtat. of 21 *Hen.* 8. *cap.* 5. yet how can it be ſo, ſince the very words of the ſtatute be, that if one do *will* by his teſtament or laſt *will* any lands. *&c.* to be ſold, neither the money thereof coming nor the profits taken ſhall be accounted as any of the goods or chattels of the teſtator's; which I conceive to be all one as to ſay, that they ſhould not be *Aſſets*. For when an executor denieth himſelf to have *Aſſets*, the form of his plea is, *Quod nulla habet bona nec catalla, &c.* Yet ſince that ſtatute, *viz.* in the late Queen's time, the law was twice admitted or conceived ſtill to be according to the third of *Hen.* 6. *viz.* that the land deviſee to be ſold, or the money thereof coming, ſhould be *Aſſets*. Indeed in neither of thoſe books is there any mention of the clauſe in the ſaid ſtatute; and it is poſſible that it might be forgotten, as in other caſes ſometimes hath happened. But caſting about how to reconcile thoſe books with the ſaid ſtatute, and not to ſuppoſe the ſame forgotten at both times, both at the bar and bench, (though, being but a ſhort clauſe in the middle of a large ſtatute to other purpoſe, it might well ſo have been) at the

See 9 Eliz. Dyer 234.

Conſtruction of general words in a ſtatute, ſecundum ſubjectam materiam.

9 H. 6. 264. 14 H. 6. 36.

the laſt, though not haſtily, I grew to conceive, that the ſaid clauſe being in an act which limiteth the fees of ordinaries, and their ſcribes, according to the value of the goods of the deceaſed, and then bringeth in this clauſe, that the lands willed to be ſold ſhall not be accounted as any of the goods, *&c.* the parliament meant thereby only to exclude them to this purpoſe, that they ſhould not be accounted as part of the goods in the valuation, according to which the ſaid fees were to be rated: and though the words be general, that they ſhall not be accounted as any of the goods, *&c.* yet it is the more probable that the parliament intended no farther than as aforeſaid, becauſe that clauſe, after the fees limited in anſwerableneſs to the values, is brought in by a *Proviſo*, *viz.* Provided always, that if the deceaſed willed any lands to be ſold, the money nor profits ſhall not, *&c.* And thus perhaps it was underſtood and conſtrued in the ſaid late Queen's time; though no mention be of any remembrance of that clauſe or proviſion in either of thoſe caſes reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the perſonalty into the realty, *& e contra*, I ſhew it thus: if a debt were due to the executor as executor, by ſtatute, recognizance, or judgment, and he ſue execution, and have land of the debtor's in extent; now is the perſonal duty turned into a chattel real. On the other ſide, if ſuch an eſtate by extent, or a leaſe for years mortgaged, come to an executor, and the debtor or mortgagor payeth the money due: now are theſe real chattels turned into *Aſſets* perſonal.

Another

Another ſpecial caſe of equity oppoſing law.

IF *A.* be bound to *B.* by bond, ſtatute or recognizance, for aſſurance of land, *B.* dieth, and the land deſcends to his heir; or be it that *B.* ſold the land to *C.* and aſſigned to him the bond ſtatute, *&c.* yet muſt the ſuit or taking out the extent be in the name of the executor of *B.* and neither of the heir or aſſignee. And that which is recovered or gotten in extent will be *Aſſets* in law to charge the executor, as I take it; yet in equity it pertains to the heir or aſſignee. *Quære*, if the executor meddle not, but only ſuffer his name to be uſed.

Suppoſe the condition broke in teſtators life, Qu. to whom it pertains in that caſe. Vide ante p. 65.

Of things come to executors by condition.

FIrſt we wil conſider of conditions bringing back to executors goods or chattels granted away by their teſtators. Touching which there is no doubt, but if the condition be any other than for payment of money, or other things valuable by the teſtator or his executor the chattels returning to the executor are *Aſſets* in his hands: as put the caſe, of a leaſe for years; horſes, ſheep, plate, or other chattel, were granted by the teſtator to *A.* upon condition that if *A.* did not pay ſuch a ſum of money, or do ſuch other act as the teſtator appointeth, *&c.* and this condition is not performed after the teſtator's death; now is the chattel come back to the executor, and is *Aſſets.* But the queſtion hath been, (and perhaps may be) where the condition is, that the teſtator or his executors ſhall pay the money to make void the grant, and

and accordingly the executor after the teſtator's death payeth the ſum out of his own purſe, not having any money of the teſtator's in his hands; in this caſe coming in queſtion *tempore Hen.* 7. 21 H. 7. it was reſolved at the laſt, that this redeemed chattel ſhould not be *Aſſets*, but be to the executor as his own proper goods, though at the firſt three judges were of a contrary opinion, *viz.* that the goods redeemed ſhould be in the executor as goods of the teſtator. And truly I muſt confeſs, that I cannot yet find good ſatisfaction in that book's reſolution, except we ſhall take the caſe there to be ſuch as that which is put and reported by the Lord *Dyer*, *tempore Hen.* 8. *viz.* that the money paid for redemption was as much as the full value of the goods pledged or mortgaged; or elſe ſhall admit the caſe to be, that this redemption was not by payment at the day conditioned. As to the firſt, it were rare if any ſhould lend money upon a mortgage, where the thing mortgaged is not of better value than the money lent; rare alſo that an executor ſhould take care to redeem with his own money that which ſhould yield no benefit or advantage to him, or his teſtator. Let us therefore ſcan and examine the point, ſince the ſame may come frequently in uſe: and this we may the more decently do, becauſe the Lord *Dyer* in the margin of the caſe by him reported, as aforeſaid, ſaith expreſly, that the ſaid other *temp. Hen.* 7. was not at all adjudged, himſelf having viewed the roll, which he there ſets down, and the names of the parties; we will therefore put the caſe thus: *A.* poſſeſſed of a leaſe for ſixty years of one hundred pounds land mortgageth it for five hundred pounds; or be it that the mortgage or pledge be of a jewel

or

or piece of plate for half the value; and now before the day limited for payment and redemption, *A.* having made *B.* his executor, dieth, and *B.* at the time and place maketh payment as was conditioned: now the queſtion is, whether this leaſe, plate or jewel, being worth much more than the ſum for which it was mortgaged, ſhall be in him wholly in his own right and to his own uſe, or partly, if not wholly, as executor to *A.* ſo as to be ſubject to the payment of debts and legacies. Here it muſt be clearly admitted, that *B.* was enabled to this redemption only and meerly by the condition annexed to the mortgage or pledging. It muſt alſo be admitted, that this condition, and the power or intereſt to take benefit thereof, came to him and was derived only as executor of *A.* This being premiſed, it muſt needs follow, (as to me it ſeems) that the condition working and having his operation in the redemption to deſtroy the grant, mortgage or pledging, it muſt needs make theſe things again the teſtator's goods *in ſtatu quo prius*, and ſo to be in *B.* as executor; ſince in that right only he was intitled to take benefit of the condition. For what is it which hindered, before this, from being the teſtator's goods? nothing certainly but only the force and ſtrength of the mortgage or pledge. Now by the redemption, that is become void, and hath loſt its force; therefore the property of theſe things muſt now needs be as if no ſuch mortgage or pledge had been, or as if it had at the firſt been void and of no force. Thus muſt the condition work for him who made it, *viz. A.* the teſtator: and thoſe of the contrary opinion in the time of King *Hen.* 7.

do

do yet ſay, that by this redemption the teſtator is ſo much indebted to the executor as he diſburſed for the redemption; which could ſtand with no reaſon, unleſs by it the property and intereſt ſhould be reduced to the teſtator's behoof. That thus it is, is alſo proved as to me it ſeems, by the caſe of mortgage of inheritance, upon which the heir making payment, according to the condition, is not now in as a new purchaſer, but as heir, ſo as he ſhall have his age, and be in ward even for his land; yea, it ſhall be *Aſſets* in his hands for ſatisfaction of his father's, as other anceſtors debts: which in ſome reſpect is a harder caſe than that of the executor; for he hath means to ſatisfie himſelf of the money diſburſed, either out of the thing redeemed, or other goods of his teſtator, but the heir hath no ſuch means. Yet it will be aſked, how the executor can be free from miſchief: for if this thing redeemed be intire, as the cup or the leaſe, the whole will be taken in execution for the teſtator's debts. To admit this, yet here is one clear way of remedy, *viz.* The executor may before ſuch execution ſell the thing, and ſo pay himſelf, and retain the ſurpluſage to the teſtator's uſe; and the like of this is frequent in uſe, *viz.* for executors to pay off the teſtator's debt with their own money, and to make themſelves ſatisfaction out of the teſtator's goods. Beſides, it is not impoſſible that this redeemed thing ſhould be thus in intereſt parted, that anſwerably and proportionably to the ſum diſburſed for redemption, with reference to the value of the thing redeemed, a moiety, or third part, or three parts thereof, ſhould be to the executor in his own right, as

his

his own proper goods, and the reſt in him as executor. As *poſito* that *A.* and *B.* were tenants in common of ſuch an entire chattel: *A.* maketh *B.* his executor, and dieth. Now hath *B.* one moiety as executor, and another as his own proper; and upon a judgment againſt him as executor, that moiety only which he hath as executor muſt be taken in execution. And here may be remembred, how in execution of a judgment, or levying of an amerciament out of an entire chattel of more value than the ſum to be levied, the whole is to be ſold, and the ſurpluſage above the debt or amerciament is to be delivered back to the owner. For in all this debate, we muſt preſume the thing redeemed by the executor to be of better value than the ſum paid, elſe we may eaſily admit the whole to the executor.

Again the leaſe for years is not ſo entire a thing, I mean the land let, but that thereof partition may be made, yea, enforced by action, between joint-tenants and tenants in common. But here will be objected the caſe of redemption by the daughter and heir, who though ſhe hath a brother born after, ſo as now ſhe is no longer heir, yet ſhe ſhall, as the book ſaith, retain the land redeemed from the heir as a perquiſite or purchaſe. As for this, (which I will not oppoſe) the law ſo framed to the favour of the daughter, becauſe of great miſchief to her, if, being ſtripped of the reſt of the inheritance by the birth of a brother, ſhe ſhould alſo loſe that which her money had redeemed, without having any remedy to have her money again, or any recompence for it. But in the other caſe

caſe there is no ſuch miſchief, for that the executor may pay himſelf, as hath been ſhewed.

Now on the other ſide, if the caſe ſhall be underſtood that the redemption was by payment after the day, then will I eaſily admit that the property or intereſt is in the executor to his own uſe; or that the condition now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, ſince it was at the *will* of the mortgagee to diſpoſe of it at his pleaſure; and any ſtranger, as well as the executor, might thus have redeemed, *viz.* repurchaſed it: therefore only equity, and not law, in that caſe can make any part of the value, *Aſſets* in his hands. And ſo alſo, I think, if we ſhould admit in the other caſe of payment at the day, that the property of the chattel is to the executor as his own, and not his teſtator's goods, no part of ſurpluſage of value can in law be *Aſſets*, howſoever in equity.

Laſtly, if the executor redeem by payment at the day with the teſtator's own money or goods, none will doubt but that the thing redeemed is in him as executor, and the money by him paid for redemption is well adminiſtred, the goods redeemed being of better value. But this way it makes no difference whether the whole value of the goods redeemed ſhall be held *Aſſets*, and the money paid for redemption ſtand drowned therein; or that that ſum be ſtill adjudged in the hands of the executor as *Aſſets*, and only the ſurpluſage of the thing redeemed over and above the ſum paid for redemption.

Things accrued by covenant or assumption.

IF *A.* covenants with *B.* to make him a leaſe of ſuch or ſuch land by ſuch a day, and *B.* dieth before the day, and before any leaſe made; now muſt *A.* make the leaſe to the executor of *B.* and the leaſe ſo made to him ſhall be in him as executor, and conſequently as *Aſſets*, This is proved by the judgment in the caſe between *Chapman* and *Dalton* in the late Queen's time. Yet I confeſs that it is not expreſſed in the reſolution of this caſe, that this leaſe ſhould be *Aſſets*, but that the executors ſhould have the term as executors, which implieth as much in my underſtanding; and the declaration, whereupon the defendant demurreth, ſets forth the breach of that covenant to be *in retardatione executionis Teſtamenti*, ſo as the damages thereupon recovered, *viz.* 330 *l.* were *Aſſets*, and conſequently alſo ſhould the term have been, in lieu and recompence whereof theſe damages were given. The like law, if *A.* aſſume upon good conſideration to deliver to *B.* by ſuch a day 20 quarters of Malt, or ſo many loads of coals or wood, or any other wares or merchandize, and this is not performed in the life of *B.* but after to his executor; it ſhall be to him as executor, and ſhall be *Aſſets* in his hands, as well as the money recovered in damages for not performing ſhould have been,

Plowd. Com. 292.

Of things accrued by remainder or increaſe.

IF a leaſe be made to one for life, the remainder to his executors for years, and he dieth; this will be *Aſſets* in the hands of his executors, though it were never in the teſtator, as was in the later end of the late Queen's time reſolved by three juſtices, the Lord *Anderſon* only being of a contrary opinion: and there it was ſaid that *Cranmer*'s caſe, wherein the contrary in effect was reſolved, was of little authority; for that there were firſt two judges againſt two, till after *Mounſon* changed his opinion, upon a conceit that there the eſtate was by way of uſe; which could make no difference. Like law, where a leaſe for years is by *will* bequeathed to *A.* for life, and after to *B.* who dieth before *A.* although *B.* never had his term in him ſo as that he could grant or diſpoſe it, yet ſhall it reſt in his executor as his goods, and be *Aſſets*. As for a remainder for years ſo in the teſtator that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof; though the ſame fell not in poſſeſſion to the teſtator in his life-time, yet no ſcruple nor doubt can be but that this is *Aſſets* to the executor, even whilſt it continues a remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible.

Nor much of other nature to theſe are the caſes, where the executor merchandizing with the goods of his teſtator maketh gain thereof. 11 H. 6. 35 per Babington.

So if the ſheep, or other cattle of the teſtator do breed, *viz.* bear lambs, calves, colts, *&c.* after the teſtator's death, even theſe which were never in the teſtator ſhall yet be *Aſſets*; and ſo the wool growing upon the ſheep after the teſtator's death. But there is one caſe worth the

conſideration, and worthy of ſome doubt, as I think, and that is this: One leaveth to the executor a leaſe for years of land worth 20 pounds by the year, and the executor, keeping this in his own hands one year after the teſtator's death, doth make thereof thirty pounds in clear gain above all charges, now whether, as to a creditor, the whole thirty pounds ſhall be *Aſſets*, or only twenty pounds? and the caſe, ſimply thus put, ſhall be underſtood of an occupying and manuring without any ſtock of the teſtator's; and then, if the executor did ſtock it with his own ſheep or other cattle, as he muſt have born the loſs by rot or death, ſo is it reaſon that, if the manurance prove gainful, he reap the fruits thereof in recompence of his adventure, and of his induſtry, ſkill, and good huſbandry. But if the teſtator's ſtock of ſheep and cattle were (as of neceſſity, or for the better advantage of the teſtator's eſtate) continued upon the leaſe-land, then is it reaſon that the gain or loſs, whetherſoever of them God ſendeth, do redound to the teſtator's eſtate. Like law, (as I think) if an executor, finding that he cannot inſtantly after the teſtator's death let the leaſe, at or near the value, ſhall therefore buy ſeed-corn, and hire the plowing, *&c.* But it may be ſaid, that the leaſe hath one entire valuation at the firſt upon the appraiſment. To this I anſwer, firſt, that the value upon the appraiſment is not binding, nor much reſpected at the common law: if it be too high, it ſhall not prejudice the executor; if too low, ſhall not advantage him: but the very value found by the jury, when it comes in queſtion whether the executor have fully adminiſtred, or have *Aſſets* or not, is

that

that which is binding. Next I ſay, that if a long leaſe come to executors of land worth an hundred pounds by the year, and no ſale is made thereof by the ſpace of a year or more; now the term continuing of the like value as at firſt, it is no reaſon but the hundred pounds raiſed the firſt year ſhould go towards the payment of debts and legacies, rather than any of them ſhould be unpayed. Theſe things, I mean the knowledge of them, are uſeful two ways, *viz.* Firſt, to give light to executors, to diſcern what unto them of right pertains: next, to ſhew unto creditors and legatees what, and how far, things ſhall be *Aſſets*, that is to ſay, goods to enable, charge, and bind executors to pay debts and legacies. For whatſoever, any of theſe ways, cometh to the executors from their teſtator, or is recovered by any of theſe actions, ſhall be in their hands *Aſſets*, the coſts and charges of recovering deducted.

CHAP VII.

What manner of intereſt an executor hath in his teſtator's goods and chattels, and how different from the common intereſt which they or others have in their own proper goods.

THE intereſt which an executor hath (as executor) in the goods of his teſtator is much different from the abſolute, proper and ordinary intereſt which every one hath in his own proper goods, as may well appear in and by theſe points. Firſt, Although a ſtranger take away theſe goods, the

In F. N. E. the writ for the executors is, Quære 4 boves qui fuer ipſius C. ſub cuſtod. ipſor' execut' apud N. invent. cepit. F. N. B. Engliſh, p. 193.

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treſpaſs for the executor is of ge-
, *Quære bona ſua cepit*, calling them
ds; whereas a man outlawed in debt,
r convict or attainted of felony or treaſon,
eiteth all his own goods, yet theſe which he
ath as executor ſhall not be forfeited. If a vil-
lain be made executor, his lord cannot take theſe
goods, though he may take all the villain's own
goods: and for taking ſuch goods, or for a
debt due to the teſtator, a villain may ſue his
lord. Nay, if the executor grant all his goods,
ſome good opinion hath been, that theſe which
he hath as executor ſhould not paſs; yea, the
Lord *Dyer* ſo held in the late Queen's time,
with this difference, *viz.* Where the grantor is
named executor in the grant there the goods
which he hath as executor ſhould paſs; but
otherwiſe, if he be not named executor in the
grant. And that this opinion is probable, will
farther appear by that which followeth.

Lit. page 4. 1 E. 4. Yet 39 H 6. f. 15. A releaſe of all actions by an executor extincts actions as executor. But Frowick is againſt it in 26 Hen. 7. Kel. 64. Villain may ſue his lo d in ſuch caſes, and recover damages to teſtator's Uſe. Co. Lit. f. 2.

Secondly, The executor cannot by *will* give
or bequeath the goods he hath as executor; and
if he die inteſtate, and adminiſtration of all his
goods is committed to *J. D.* yet hath he no-
thing to do with the goods which the inteſtate
had as executor to his teſtator: thus all is goods
reacheth not to his goods as executor.

The commiſſion of adminiſt. is, omnium bon' & catallor' jurum & creditorum quæ fuer' the inteſtate's.

Thirdly, Whereas a man's goods ſtand liable
to the payment of his debts both in his life-time
and after; the goods which a man hath as exe-
cutor are not to be taken in execution for his
own debts, either upon a recognizance, ſtatute,
or judgment had againſt him. And if ſuch a
one die indebted, leaving to his executor much
goods which he had as executor; theſe are not
Aſſets in his hands liable to the payment of his
debts,

See theſe ſo reſolved in Pl. Com. 525, inter Banſby and Grantham. P. 20 Eliz.

v. Cr. Car.

debts, but only for the payment of the firſt teſtator's debts or legacies. Therefore a *Quo minus* brought by an executor, ſhewing that he was not able to pay the King's debt, becauſe the defendant detained from him an hundred pound, which he owed him as executor to *J. S.* was overthrown; for that it could not be intended, ſaith the book, that the King's debt could be ſatisfied with that which the plaintiff ſhould recover and receive as executor. Whereas a woman being poſſeſſed of any chattels perſonal, *viz.* moveable goods, all are deveſted out of her into her huſband by her marriage, ſo as if he die, and ſhe over-live, they be not heir's again, but her huſband's executors or adminiſtrators; and if ſhe die, all be the huſband's without being executor to his wife, It is not ſo of the goods which he hath as executor; theſe ſtill remain in and to her if her huſband die; and if ſhe herſelf die, for that ſhe hath them as it were in another's right, *viz.* as ſhe repreſents the perſon of her teſtator, her huſband ſhall not have them, if he be not his wife's executor, and ſo executor to her teſtator,

Laſtly, Whereas the writ of treſpaſs ſeems to make no difference between one's own goods and thoſe he hath as executor, that being a poſſeſſory action or ſuit grounded upon the poſſeſſion; yet come to an action of detinue, which more taſtes and participates of the right, and there are they differenced: for where for my own debt, when I ſue, the writ ſaith, *debet & detinet*, *viz.* that the defendant owes me and detains from me that ſum; yet when I ſue as executor, the writ ſaith not *debet*, he doth owe

The writ may be in his name only out of whoſe poſſeſſion the goods were taken. Co. l. 5. f. 51. If the action be of ſuch a nature that he ought to name himſelf executor, it ſhall be in the detinet only otherwiſe è contra. 20 H. 6. 5. 5 Co. 32. Winch 80.

Lane 86. S. C. Vide hic poſtea p. —. Sup. p. 43.

me, but *detinet* only, he detains from me, as admitting that he is not debtor to me, though he ſhould pay me. And ſo where I am ſued as executor, the writ makes me not a debtor, but a detainer: otherwiſe, where in my own right I owe and I am ſued for a debt. Accordingly, where judgment in an action of debt is given againſt one as executor, it is not generally that the plaintiff ſhall recover againſt him, but he ſhall recover of the goods of the teſtator; and therefore upon this judgment no *capias* lieth againſt him, to enforce him to pay by arreſt of his body, becauſe he is not properly debtor, But if after it be returned, that he hath waſted the teſtator's goods out of which the ſaid debt ſhould be ſatisfied, then, he having made himſelf a debtor, a *Capias ad ſatisfaciendum* ſhall be awarded againſt him, and then he ſhall be taken in execution. So alſo in ſome caſes of falſe plea pleaded; for where
34 H. 6, 45. the judgment is *de bonis propriis*, the plaintiff may have a *Capias ad ſatisfaciendum*; and that judgment is in divers caſes for the damages, although not in many for the principal. As for the *Capias* before judgment, in the mean proceſs againſt an executor, that is becauſe of his contumacy in not appearing upon the former proceſs.

The reaſon of this different intereſt between an executor and another, or between the ſame man's having goods as executor and others in his own right, as alſo of the different manner of one's being indebted as executor, and otherwiſe in his own right, is well expreſſed by the Lord *Cook* in *Pinchon*'s caſe, *viz.* Firſt, that the goods which one hath as executor he hath not in his own right, but *in auter droit*, that is, in the right

right of another, meaning his teſtator. Secondly, That executors are but the miniſters and diſpenſers, or diſtributers, of their teſtators goods. Co. lib. 9. 86. b. See this alſo Plow. Com. 5. 20. a.

Of alteration of property in the executor's hands, ſo as ſome goods become his own, which he had as executor.

TO this head or chapter, treating of the difference between the intereſt in goods as executor, and others had meerly in one's own right and to his own uſe, it is not impertinent to conſider how that which one hath at the firſt as executor may be changed in property, and become the executor's own to his own uſe, as other his goods which he had not as executor. Here let us firſt conſider of ready money left by the teſtator: for ſince pieces of money, *viz.* ſhillings, groats, pieces, and half pieces of gold, cannot be known one from the other, it muſt needs follow, that theſe coming to an executor from the teſtator, muſt in ſome ſort be altered in property, ſo as though the executor ſhall be ſaid to have ſo much in money or value, yet can it not be diſcerned which money in his houſe was his teſtator's, and which his own. Conſequently the ſheriff, upon the *fieri facias* for a creditor, who hath recovered againſt the executor a debt owing by the teſtator, cannot take away money in execution as the teſtator's in my opinion. *Quære*, if thereupon *Devaſta.* ſhall be returned, or what ſhall be done.

But what if the teſtator were indebted to the executor, or if the executor, not having ready money of the teſtator's, or otherwiſe, ſhall pay a debt of the teſtator's with his own money, what 2 El. Dy. 185. This divers books affirm, 20 H. 7. 4. & Kel. Rep. 59. & 2, 3 El. Dy. 117. 6 H. 8. Dyer f. 22.

what ſhall we ſay of the converſion or alteration of ſome of the goods from being his as executor, to be his meerly in his own right? Hereof I have ſhewed elſewhere my conceiving, which is briefly thus; that except either he have in his hands money of the teſtator's (for of that it is eaſie to make a proportionable change) or unleſs the ſum to him owing from his teſtator, or by him paid for his teſtator, amount to the full value of all the teſtator's goods in his hands, or do exceed the ſame, no alteration can be, until ſome election or declaration by the executor made, which of the goods not exceeding the debt unto him, he will have to be his own: for where the teſtator's goods exceed this debt to him, the property of all cannot be changed; and of what part ſhall the law adjudge the change, till choice by the executor? It is good therefore for him to do as the mother-guardian in ſocage, who is to endow herſelf, calling her neighbours, and expreſſing to them which part of the land ſhe will have for her dower. So let the executor do. But let him take heed that his election or declaration exceed not his debt, leſt it be void. And that ſuch particular election is to be made, ſeems to me proved by the caſe of 21 *E.* 4. *fol.* 21. *b.* where the payment of money, and detaining or taking of a horſe of the teſtator's, is mentioned. But *Choke* there ſays, this cannot be done without the ordinary's aſſent. And the reporter thinks, though the ordinary do aſſent, yet the property ſhall not be turned into the executor as his own.

Plow. 554. So of a legacy in money given to the executor.

See 2, 3 El. Dyer 187.

Another alteration is of the profits of a leaſe come to the executor from the teſtator: for ſince no more thereof ſhall ſtand in the executor as

Aſſets

Aſſets than ſo much only as exceeds the yearly value, according to the reſolution in *Hargrave*'s caſe, it muſt needs follow that the reſidue of the profits muſt be the executor's, he paying the rent out of his own purſe, as that caſe reſolves in conſequence, *viz.* that he ſhall be ſued for it in the *Debet*, and in the *Detinet* only as for the rent due before the death of the teſtator. Thus [b] though he have the leaſe as executor, yet part of the profits are merely his own, not as executor.

Co. lib. 5. f. 31. b.

And looking back upon this caſe, we may diſcern a neceſſity ſometimes of the executor's paying with his own money for his teſtator's debt: as where the teſtator being to pay a rent at *Michaelmas* or our *Lady-day*, he dies a day or two before, or to put it more clearly, a day or two after the feaſt, not leaving any goods to pay the rent, other than the future profits of the leaſe. Here, unleſs that executor will forfeit the leaſe, he muſt lay out of his own money.

Now, if in this and other like caſes he could not do this until he had under ſeal, or by act in the court ſpiritual, an aſſent of the ordinary, it would be an extraordinary trouble to executors.

I find alſo *tempore Hen.* 7. another mean of altering property, to wit, where a *Fieri facias* comes to the ſheriff to ſell or levy a debt of the teſtator's goods: now, ſaith the book, may the executor buy theſe goods of the ſheriff as well as another; and if he do, the property which he had as executor ſhall be turned into a property *in jure proprio*.

20 H. 7. 5. a.

If

If an executor amongſt his teſtator's goods find and take ſome not his, and after, theſe being claimed by the owner, who left him in the cuſtody of the teſtator, the executor not crediting the claim, ſtill keeps them, and the owner thereupon recovers damages in an action of treſpaſs, or of trover and converſion; now (and ſo in all other like caſes) are theſe goods become the treſpaſſor's in property, becauſe he hath paid for them: therefore it is not ſtrange, if in like manner an executor, paying out of his own purſe for or in lieu of the teſtator's goods, have ſo much of them (where no certainty) changed in property, and become his own. This is but put as an inſtance underſtood with the exceptions and cautions precedent.

20 H. 7. Kelw. Ca. 58.

CHAP. VIII.

Of ſome caſes and queſtions between the executor and the heir.

THE executor may in convenient time after the teſtator's death enter into the houſe deſcended to the heir, for the removing and taking away of the goods, ſo as the door be open, or at leaſt the key be in the door: and this I underſtand of the door of each room. For although the door of entrance into hall and parlour be open, the executor cannot by that juſtify the breaking open of the door of any chamber to take goods there, but only may take thoſe in the rooms which be open. And this is proved,

21 H. 6. 30. If other goods taken among them, he is excuſed.
21 H. 7. 25. Vide Lib. intr. 640. It is ſo pleaded.

proved, as to me it ſeems, by the caſe of the cheſt with evidences, which, ſaith the book, the executor may take and put out the deeds, delivering them to the heir, *viz.* the cheſt being unlocked, as I underſtand it. Now a chamber or other room within a houſe locked is an incloſure of better reſpect than a cheſt. But if the goods be not removed within convenient time, the heir may diſtrain them as *damage feaſant.*

43 E. 3. 24. Bro. 145. makes a Quæ. if it be locked. Plow. Com. 280. 43 Ed. 3. 2. 10 Ed. 4, 5, 6.

Where the teſtator recovers land and damages, or a deed and damages, he dying before execution, the heir ſhall have execution for the land or deed, and the executor for the damages: but *temp. Edward* 4. it is ſaid, that until the heir ſue a *Scire facias*, the executor cannot ſue execution for the damages.

Of the deed, execution firſt.

If a creditor be made executor by his debtor, and pay himſelf part out of the goods, he cannot ſue the heir for the reſt, becauſe the debt cannot be apportioned; but otherwiſe he may, ſaith the book: yet *Quære*, if he do take upon him the executorſhip, and have goods ſufficient to pay all.

12 H. 4.

If a debt be recovered againſt one who dieth before execution ſued, leaving goods ſufficient to ſatisfy; now ſhall not the land deſcended to the heir be charged therewith, nor by like reaſon any land conveyed after judgment.

7 H. 4. f. 31. See Bro. Ex. 124.

See a good difference, where land is conveyed upon condition of payment to the vendor, his heirs or aſſigns, and he died before the time, and where it is to be paid to the vendee, his heirs or aſſigns, and he dieth: in the firſt caſe payment ſhall be to the executors, but not in the other.

Co. l. 3. f. 90, 91. To like purpoſe ſee more, Littl. f. 77. b. 2 El. Dyer 281. Plow Com. 291. 21 H. 7. 4.

What

What things pertain to the heir, and what to the executor, is before ſhewed. As for *Frowick*'s opinion, that where goods be mortgaged upon condition, that if the heir or executor pay &c. here if the heir make payment, he ſhould have the goods, I ſee not, for my part, how that can be.

A Directory for the following chapter.

A. *All (as but one) repreſent the teſtator's perſon, and muſt join and be joined in ſuit,* & e contra.

B. *Where one alone muſt anſwer ſuit, and how.*

C. *When they differ in plea, the beſt ſhall be taken, but one may confeſs alone.*

D. *One as well as all, may give aſſent, or releaſe the whole.*

E. *One cannot give, nor releaſe to another, nor divide.*

F. *The poſſeſſion of one is the poſſeſſion of all, to what purpoſe.*

G. *If the ſurvivor die inteſtate, the teſtator is inteſtate, though the other executor left an executor.*

H. *Executor included, in the perſon of the teſtator, and repreſents it, is his aſſign; all one,* & e contra.

I. *What change by death of the teſtator, touching proceeding in ſuit.*

K. *Proceed to or in execution; where without* Scire facias.

M. *Whether the executor ſtand in his own quality, or his teſtator's.*

N. *Where one alone may ſue,*

O. *In*

O. *In ſuit for them, ſuch as will not join ſhall be ſevered, and the other may ſue and proſecute alone: Conſequents* inde.

P. *Death of one executor, plaintiff or defendant, where abates writ.*

CHAP. XI.

How executors ſtand between themſelves, and in repreſentation of, or relation to the teſtator, as his aſſignee or deputy, or as the ſame perſon with him; and where and to what purpoſe, as other perſons.

FIrſt, All of them do repreſent the perſon of the teſtator, and therefore muſt they all join in ſuit againſt others, and in ſuit by others they muſt be all made defendants, or at leaſt ſo many of them as do adminiſter: for though the executors themſelves muſt take notice by the *will* how many executors there be, and muſt frame their ſuit accordingly; creditors and ſtrangers need not take notice of any more than do adminiſter, and execute the office of executors. For this reaſon, as I take it, in the time of King *Edward* the third, where two executors were of a term, and the reverſion was granted by fine, mentioning but one termor, and thereupon a *Quid juris clamat* accordingly brought againſt that one executor; this was held good enough, though the other executor was not named in the ſuit: belike, becauſe that one (who indeed was the teſtator's wife) did only occupy the land, and take the profits thereof; for

Are as one perſon; therefore cannot plead ſeveral pleas in abatement. 37 H. 6. 17. 39 H. 6. 44. 38 E. 3 9. Bro. Ex. 13. Bro. Ex. 20, 21.

Therefore one executor ſued, if he pleads that there is another executor not ſued, muſt plead, that he did adminiſter. 9 H. 6. 44. Bro. 13. 33 H. 6. 38. Bro. 20. 32 E. 3. Quid juris clamat 5.

for elſe, ſince all the executors do repreſent the teſtator's perſon, all muſt have been named. Therefore did the judges reſolve in the time of *Hen.* 4. that where a leſſee for years made two executors, and one of them was deſtrained by the lord for rent, who avowed upon the leſſor; that executor ſhall have aid of his fellow-executor, to the end that both might have aid of the leſſor, which one alone could not. And upon this reaſon, *viz.* that the executors repreſent the perſon of their teſtator as one perſon, (for ſo ſpeaks the parliament) it was enacted in the time of *Edward* the third, that the executors, though never ſo many, ſhall have but one eſſoyn, either before appearance or after, becauſe their teſtator, whoſe perſon they repreſent, could have no more.

13 H. 4. Aid, 186.

They ſhall have but one eſſoin among them all before appearance, and another after. A.

Ed. 3. c. 3. B.

But not if he appear at the ſummons, 1 E. 4. 1. 14 H. 4. f. 11. But the plaintiff muſt declare againſt all. He need not, but he may admit another to appear and plead, after 7 H. 4. 12. But proceſs muſt be continued againſt all. 7 H. 6 35. Executors of executors by equity. 30 H. 6. 45. Bro Ex. 9. 28 H. 6. f. 4. 14 H. 4. 23, 24. So negatively. 22 H. 6. f. 1. 28 H. 6. f. 4. 3 H. 6. 35. a. 39 E. 3. 5. There it is not meely as executors; it is out of the ſtat. 11 H. 4. 63. as if in Deb. & det.

† It is farther alſo enacted by the ſaid ſtatute, that where two or three executors or more be, they being ſued in an action of debt, though all do not appear, yet ſuch one of them or more as doth or do appear at the grand diſtreſs, ſhall anſwer alone without his or their companions. And this ſtatute hath been taken by equity in three reſpects. 9 *Ed.* 3. *ſtat.* 1. *c.* 3.

Firſt, touching the perſons; that it ſhall extend not to executors only, but alſo to executors of executors, yea, to adminiſtrators alſo; though the ſtatutes ſpeak only of executors.

Se-

* If Judgment paſs for plaintiff, he ſhall have judgment and execution, againſt them that have pleaded, and againſt the others named in the writ, of the teſtator s goods, as well as if they had all pleaded.

Secondly, touching the action; whereas the ſtatute ſpeaks only of the action of debt, it is taken by equity to extend to other actions, as the writ † *De rationabili parte bonorum*, and *detinue:* yet perhaps the later action will be ſaid not to be maintainable againſt executors for their teſtator's act, but for their own only. But we are not yet come ſo far as to determine what is maintainable, but whether, before all the executors do appear, he or they which have appeared ſhall be put to anſwer; and ſo to bring it to deciſion, whether the action be maintainable or not. I think alſo that in the action of covenant, and all other actions againſt executors as executors, he which appeareth muſt anſwer without his companions, though the greater opinion in the *Quadrageſimes* were contrary touching the action of covenant. But as for the *Subpœna* againſt the executors, which is to make them to anſwer to a ſuit in equity, that hath been *temp. E.* 4. taken to be out of the reach and intent of the ſtatute. So alſo of the *Latitat* in the King's Bench, as was held in the ſame King's time; except all the executors, making up the whole repreſentative body of the teſtator, be in the cuſtody of the marſhal, one or more of them who are there ſhall not be in-

B. Cont. 47 E. 3. 22. So 7 E. 4. 20, 21. 3 H 4. 20. In Sci. fac. upon a pardon by a defendant outlawed at the ſuit.

47 E. 3. 22, Only Fenold in the affirmative.

8 Ed. 4. 5.

9 E. 4. 12. 13. B.

20 vel 21 Jac. Regis.

† The writ of rationabili parte bonorum lieth againſt the executors, by the wife, or ſons, or daughters of the deceaſed reſpectively, for their reſpective ſhares of the goods, after debts paid and funerals performed; which is by common law, *viz.* one third part for the wife, another for ſons and daughters, the third for the executors; but the writs rehearſe the cuſtoms of the counties, F. N. B. Eng 270.

forced to anſwer: and ſo was it alſo lately held in the King's Bench where Maſter Juſtice *Houghton*, gave an excellent reaſon that this caſe is out of the ſaid ſtatute, *viz.* for that this writ doth not mention any debt, or name the defendants executors.

B. 1 E. 4. 1. 40 E. 3. 1. B. 11 H. 4. 63.

Thirdly, and laſtly, That ſtatute is extended by equity to other writs or proceſs; for where the ſtatute ſpeaks only of the grand diſtreſs, and the executors appearing thereupon; it hath been many times ruled, that when he or they appear upon the attachment, *Capias* or *Exigent*, anſwer muſt be, though the reſt appear not; for ſo the word *Diſtreſs* is taken for all compulſory means, or enforcement of appearance. But where the ſtatute reacheth not, *viz.* when the proceſs is determined againſt one or more as by outlawry, *&c.* there the reſt muſt anſwer by the rules of the common law; except it be in the caſe of huſband and wife executors; for there the wife cannot anſwer without her huſband, nor doubtleſs can he without her, where ſhe, and not he is executor; but where both be executors, there he may anſwer without her, but not ſhe without him. When executors as defendants have appeared, if any one of them will confeſs the action, this binds and concludes the reſt; but if one will plead one plea, and the other another, that (ſay ſome) ſhall be received which is beſt for the teſtator's ſtate: ſo where they ſue, ſuch as will not proſecute ſhall

C. Or if but one appear, 28 H. 6. f. 364. judgment againſt all See 9 E. 4. 12. 13. Where B. who is not executor, is jointly ſued with A. and B. confeſſeth, 21 H. 7. 25. Yet 7 E. 4. 7. they may ſever in pleas not dilatory.

C. 7 H. 6. f. 6. per Cotteſmore. If they recover, and one of them prays a Cap. ad ſat. and the other a Fieri fac. the firſt as beſt, ſhall be granted, 3 H. 4. 10. Bro. 44. So where the defendant is outlawed at the ſuit of two executors, and upon the Scire facias after his pardon but one appears. 21 H. 7. 25. 9 E. 4. 12, 14.

be

be † ſevered, and the reſt without them may proceed; and in like manner where they pray to be received to defend their term, and one of them after makes default, it ſhall not be the default of all; but the reſt, or he, if it be but one who appears, ſhall be received to uphold the defence of the term.

Thirdly, So where they plead a releaſe to the teſtator or themſelves, one after making default; this ſhall not be, nor make a total default in the executors, to induce a judgment or condemnation againſt them. Yet in truth, each executor hath the whole of the teſtator's goods and chattels, be they real or perſonal, and each may ſell or give the whole. One of them cannot give nor releaſe to the other his intereſt; and if he do, it is void, and he who releaſeth, ſhall have ſtill as much intereſt as he to whom he releaſeth, becauſe each had the whole before. Upon this reaſon long ſince, where one of the two executors releaſed but his part of a debt, it was held that the whole was diſcharged. And ſo, if one executor grant his part of the teſtator's goods, all paſſeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moieties between executors. Therefore alſo, though a leaſe for 1000 years of 1000 acres of land come to two executors or more, no partition or diviſion can be made between them,

21 E. 3. 13. 27 H. 8. 21, 22. D. E.

C. If an horſe come to four executors, each hath an horſe, and yet all four have but one

E.

† Where one executor will not proſecute with the reſt, there is a judgment of ſeverance after default on ſummons, viz. Ideo confid. eſt quod præd. A. ſequatur ſolus ſine ipſis T et R. verſus præd. W. de placito præd. Vide Raſt. Ent. p. 330. tit. Exec. in Severance.

them, becauſe it is not between them as between joint leſſees of land, where each hath but a moiety in intereſt, though poſſeſſion of or thro' the whole. Amongſt executors each hath the whole, and therefore if he grant his part, he grants the whole. But one executor may demiſe or grant the moiety of the land for the whole term, and ſo may the other do; and this way they may ſettle in friends or others truſted for them, a moiety for each, either in ſeveral or undivided: but one of them cannot make a leaſe to the other of any part, for he had the whole, nor can one ſue the other as executor. Yet if the teſtator deviſe to one of his executors all his goods, after ſuch debts and legacies ſatisfied, there, after thoſe ſatisfied, the executor may take the goods, and maintain an action of treſpaſs againſt the other executor, if he take them from him, and conſequently an action of *Detinue*, for keeping or detaining them: but this is as legatee, his own aſſent perfecting the legacy.

D.

6 H. 7. 5.

The poſſeſſion of one executor is the poſſeſſion of all the reſt. ſo as if one appearing to a ſuit, and the other making default in whoſe hands all the goods be which are not adminiſtred; if, I ſay, here he that appears pleads that he hath nothing in his hands, this ſhall be found againſt him; for whatſoever any of the co-executors hath, he alſo hath, and is in his poſſeſſion; and ſo ſhall the creditor recover, and have judgment to be ſatisfied out of the teſtator's goods, as in his hands. And therefore if goods be taken from one, all may maintain an action of treſpaſs thereupon; for the poſſeſſion of one is

14 H. 4. 12. Bro. 12. F.

All muſt ſue, 19 H. 6, 65. Cont. 24 E. 3. 26.

It may be in his name only from whom taken, nor need he be named executor.

is the poſſeſſion of all. But the poſſeſſion of one ſhall not be ſo the poſſeſſion of all, as to charge the others own goods, whereof more elſewhere. Bro. Exe. 31. 39 H. 6. 45. F.

Where two executors be made, the one making a *will* and executors, and dying, if the other die after inteſtate; now ſhall not the executor of him who firſt died be executor to the firſt teſtator, but he is dead inteſtate, becauſe the ſurviving executor is ſo dead, and in him the executorſhip was wholly and ſolely ſettled by the death of his fellow before him. So adminiſtration *de bonis non admin.* ſhall be committed. G. 38 H. 8. Bro. Exe. 149. 39 H. 6. 45.

The executors, or executor if but one, ſo repreſents the perſon of the teſtator, that he is in law his aſſignee by the very making of him executor: ſo as if one covenant to make a leaſe to *J. S.* and his aſſigns by ſuch a time, and *J. S.* dieth before that time, and before the leaſe made; now muſt the leaſe be made to his executors as his aſſignees, repreſenting his perſon: ſo alſo in a condition to pay the feoffor or his aſſignee: yet a leaſe to *A.* and his aſſigns during the life of *B.* ſhall not go to the executors of *A.* So where in a general pardon by parliament there is an exception of perſons outlawed after judgment, the perſon ſo outlawed ſhall ſatisfie the creditor who hath outlawed him. If the outlaw die before this done, his executor, as repreſenting his perſon, may make ſatisfaction, and ſo make the benefit or the pardon to extend to his teſtator, for ſaving his goods, as if himſelf had ſatisfied his creditor, though he left him unſatisfied when he left the world, *& diem clauſit extremum.* Yet where *A.* ſold land to *B.* upon *Proviſo*, that if he payed to *B.* his heirs or aſſigns, *&c. B*, died, *A.* payed at the day Co. lib. 5. f. 97. H. Chapman & Dalton's caſe, Plow. 286. Sir Edward Hitton's caſe, lib. 6. 79. b. Co. lib. 2. f. 80. A. So where the ſtat. of W. 1. gives time for proof to him whoſe goods were wraſted, his executors may do it, if he die before the time. Co. lib. 5. 107. b. Co. lib. 6. f. 0. Alſo executors may have reſtitution for ſtolen

goods, and a writ of error; yet the ſtatute ſpeaks but of the party.

A.

2 El. Dy. 180. Cont. where to A. the feoffor, his heir or aſſign. Co. lib. 5. f. 97. 2 El. Dy. 183. 301.

to his executor, and it was doubted that it was not good; for the word aſſignee could not reach to him, being no aſſignee of the land. And where the executor brought an action of account upon a receipt by the hands of the teſtator, the defendant could not be admitted to wage his law; for that this was held a receipt *per auter mains:* yet it is clear, that if one by bond or covenant tie himſelf to pay ſuch a ſum at ſuch a day, not mentioning his executor at all; yet is the executor bound, as included in the name or perſon of the teſtator. And where the ſta-

23 H. 8. c. 3.

H.

25 H. 8. 16.

tute of 23 *Hen.* 8. gives the writ of attaint (in the courſe there mentioned) againſt the party that had judgment, it lieth againſt the executor, if he be dead; but therefore another reaſon is given. Where a man was bound that he would not ſue upon ſuch a boud, and he died, and his executor ſued; this was held to be no forfeiture of the bond. So where one was bound to pay ten pounds within a month after requeſt made to him, and he dieth before requeſt; it ſufficed not to make it to the executor, as *Manwood* ſaid. It was likewiſe held, that the warrant of attorney put in for the plaintiff in debt, it ſufficeth not for his executor to bring a *Scire facias* upon the judgment. And if executors ſue execution upon a ſtatute in the name of a conuſee, as if he were alive, this is void, and they may ſue out a new extent; and this they may do without any *Scire facias*, as well as the conuſee might if he had been alive. But by *Huſſey*, Juſtice, if the conuſor in a ſtatute-ſtaple be returned dead by the ſheriff upon the extent, a *Scire facias* muſt be ſued out before extent proceed; and upon a judgment had, if the re-

M. 15 & 16. Eliz.

L.

34 Eliz. vel circiter, Titherly and Lexeor, Walſh. in Ban. Rez.

26 H. 8. Bro. ſtat. Merchant, 43.

K.

2 R. 3. 8.

H. I.

15 H. 7. 14.

F.

coverer

voverer die before execution, his executor cannot, as himſelf might, ſue out execution without a *Scire facias*, as is there ſaid. Yet if after a *Capias ad ſat.* awarded, the plaintiff die before it be executed, the ſheriff may proceed to the taking of the party, and is not ſubject to any action of falſe impriſonment: nay, if he ſuffer him to eſcape, he is chargeable, as *temp. Elizabeth* it was reſolved upon the motion of *Anderſon*; but withal it was held, that relief might be by *Audita Querela.*

15 E. 3. Reſpon. 1. con upon a ſtat. Merchant. K. Cont. Nat. Br. 267. upon a Recog.

I. H. 30 El. Rot. 31. in Ban. Reg.

Like reſolution was in the King's Bench, after ſome doubt by *Wray* and the other judges, where the defendant died after a *Fieri facias* awarded, and before it was executed; that the ſheriff might proceed upon the goods in the hands of the executors.

9 H. 6. 57. b. 6 H. 7 6. 31 & 32. El. Moſſe & How. Hill. 11 Jac. Commin & Bradlin. 1 Leon. 304. 29 Car. 2. c. 3. ſ. 16. 1 Sid. 271. Baily & Bunning. Qu. notwithſtanding the ſtat. of Car. 2. if the goods are not bound as to the party himſelf from the teſte of the execution, the ſtat. being made for the benefit of ſtrangers, 2 Vent. 218. 31 El. vel circiter.

But if the defendant in an action of debt upon a bond plead a tender at the time and place of payment, and tenders the money in court, where it reſts, and then he dies; now ſhall not the plaintiff have this money becauſe the property thereof is changed, and become the executor's, as was held in the Common Pleas; but he is put to a new ſuit againſt the executor.

Yet where judgment is once given in a writ of partition for a termor, or in a writ of account; if the plaintiff die before the ſecond judgment (needful in both caſes,) the executor is not put to a new ſuit, but may proceed by *Scire facias* upon the former judgment, as the L. *Anderſon* held, upon the motion of *Fenner*, Serjeant. Though before we found the executor not in points penal all one with the teſtator; yet in points beneficial, the teſtator includes him in ſome caſes: as where an abbot granted to his

I. Paſch. 28.

leſſee to take eſtovers in another's ground, it was held that his executor, though not named, ſhould enjoy this during the term, as well as himſelf ſhould have done. And whereas the ſtatute of 23 *Hen.* 8. *ch.* 15. gives coſts to a defendant againſt a plaintiff ſuing for a wrong, or breach of promiſe, or the like, done to the plaintiff, againſt whom it paſſeth by verdict or nonſuit; it hath been reſolved, that an executor ſuing upon ſuch wrong or breach of contract to his teſtator made, ſhould not pay coſts, becauſe he is another perſon than the teſtator; and ſo it is uſual in experience. But if in ſuit the attorney of the executor miſbehave himſelf towards him, and for this the executor ſueth him; here, if it paſs againſt him in manner as aforeſaid, he ſhall pay coſts, becauſe this was a ſuit for a wrong done to himſelf.

Trin. 36 El. in Ba. Reg. H. M.

Pat. 41 Eliz. in Com. Ban.

If *A.* recovers a debt as executor of *J. S.* and makes *B.* his executor, and dies before execution ſued; *B.* is not put to a new ſuit, but may have execution upon that judgment. But if *A* or *B.* died inteſtate, now could none as adminiſtrator to either of them, nor as adminiſtrator of *J. S.* have execution of this judgment; for the former hath no intereſt in any thing pertaining to *J. S.* and the later cometh to title above the judgment, *viz.* as immediate adminiſtrator to *J. S.* who is now dead inteſtate, and derives no title from the executor who recovered.

H. 28 H. 8.

If a conuſee have a certificate into the *Chancery* upon a ſtatute, and then dies before extent taken out; his executor is put to a new certificate, and for obtaining of it muſt make affidavit that no extent hath yet been taken out.

2 Ch. Dy. 110.

If an alien join with his wife who is executor in a ſuit for debt, and it cometh to iſſue, he ſhall not have trial *per medietatem alienig.* or *linguæ*, as ſhould be if he otherwiſe were party to a trial; as was held in the caſe of Doctor *Julio*. Yet if a nobleman ſue as executor to another not noble, he ſhall for his non-ſuit be amerced five pounds, as if he ſued in his own right; as was conceived 21 *E.* 4. 77. By the ſame rule and reaſon, doubtleſs, a nobleman ſued as executor ſhall not be arreſted, nor ſhall any *Capias* be awarded againſt him for not appearing. And if any trial ſhall be of any iſſue, there ſhall be two knights of the jury, as in other caſes where a peer is party. Likewiſe where the wife is to have her convenient apparel, whereof the executor muſt not bereave her; if ſhe be a noblewoman, it ſhall be anſwerable to her degree. M.

If one executor only ſell goods of the teſtator, he alone may maintain an action of debt for the money. So if goods be taken out of the poſſeſſion of one executor, he alone may maintain an action, and that without naming himſelf executor. A. 38 E. 3. f. 8. N.

Some touch hath been before of ſummons and ſeverance, whereunto be this added: If one executor will not or cannot conjoin in ſuit with the other, ſo as he is ſummoned and ſevered; now by his death after the ſuit is not abated, 16 *Ed.* 2. *Fitz.* 111. Yet if he live till judgment, he may ſue execution, ſay other books, 13 *Ed.* 3. *Fitz. Exec.* 9. 11 *R.* 2. *Priviledge* 2. Yet *Quær.* of that, for he cannot acknowledge ſatisfaction, as hath been ſince reſolved, *Mich.* 14 and 15 *Eliz. Dy.* 319. And the reaſon thereof P. O. 3 H. 7. I & 5 E. 2. Fitz. pro. 802. Cont. 38E. 3. 13. & 20 E. 3. tit. Account, 78.

thereof being, becauſe he is no party to the judgment; by the ſame reaſon can he not ſue execution upon it; for how can he have execution, for whom there is no judgment given? Now the recovery is only in the name of the other executor. Yea, by the ſaid laſt book it ſeems that after judgment had, he cannot releaſe the debt, becauſe it is now altered in nature, and turned *in rem judicatam*; though at any time before judgment he might have releaſed it, as both that laſt book ſaith, and the two precedent, *temp. Ed.* 3. & *Rich.* 2. Yea, in an action of account, after judgment had that the defendant ſhall account, the releaſe of him ſevered is a good diſcharge to the defendant; as was reſolved 48 *Ed.* 3. 14, 15. But this is not a plenary Judgment, for nothing is recovered thereby; but another judgment is to be had after the account, which may be againſt the plaintiff, ſo as this releaſe came before any debt or duty adjudged. What if the defendant be had in execution at the ſuit of the executor, who proſecutes it and eſcapeth? Whether may the ſevered executor diſcharge the ſheriff or gaoler by a releaſe? I think he may not.

By that above it is, plain that if any one of the executors plaintiffs die, the writ is abated; only where he ſo dying was before ſevered. Opinions have been different, as above appears. ſo alſo is it if one of the defendants executors die. Yea, if the plaintiff creditor ſue *A. B.* and *C.* as executors, where only *A.* and *B.* are executors, there by the death of *C.* the writ abates, or falls to the ground: yet *A.* and *B.* (as I think) might have pleaded in abatement, that they only were executors, traverſing that *C.*

2 H. 4. f. 14. P.

9 E. 4. 12. Bro. 34.

C. was executor: but the book doth not ſo reſolve. See 46 *Eliz.* 3. *fol.* 9, 10.

As *A.* and *B.* above might admit that writ againſt them and *C.* ſo if the writ or ſuit had been againſt *A.* only, and he ſo admit it, not pleading in abatement, the recovery againſt him alone is good. 9 *E.* 4. 12. A.

One that is outlawed, or attainted in his own perſon, may yet ſue as executor, becauſe this ſuit is in another's right, *viz.* the teſtator's but he that is excommunicate cannot proceed in ſuit as executor, becauſe none can converſe with him without being excommunicate, as a book ſays. Yet doth not this excommunication pleaded abate or overthrow the ſuit, but make that the defendant may ſtay from anſwering his ſuit until the plaintiff be abſolved and diſcharged from his excommunication. Outlaw may ſue in autre droit as executor, &c. Co. Lit. 128. 21 H. 6. 30. M. 21 E. 4. 49. 69. 42 E. 4. 13, 14. H. 6. 14, 15. Co. Lit. 134.

CHAP. X.

Of the poſſeſſion of executors, or their actual having.

1. *What ſhall be ſaid ſo to come to their hands as to charge them.* 2. *What ſhall be ſuch a getting or going from them as to excuſe them.*

WE have before conſidered what things ſhall come to executors, and, being come, ſhall be *Aſſets* in their hands. Now, for that it is ſaid in *Reedes*'s caſe, that an executor ſhall not be charged with or in reſpect of any other goods than thoſe which come to his hands after Co. lib. 5. 33. b. 34. a.

after his taking upon him the charge of the executorſhip, let us now examine what ſhall be ſaid and accounted ſuch a full and compleat coming to the hands of executors, as ſhall make them within the reach and charge of creditors and legatees, *viz.* for the payment of debts and legacies. As touching debts due to the teſtator, it hath been before ſhewed, that until judgment and execution had they be not *Aſſets* in the executor's hands. Now then as touching other goods or chattels poſſeſſory, which are of two kinds, *viz.* real and perſonal, let us put the caſe thus.

The teſtator at the time of his death hath a ſtock of ſheep in *Cumberland*, corn in the barn in *Cornwall*, bullocks in *Wales*, fat oxen in *Buck. ſhire*, money, houſhold-ſtuff and plate in *London*, a leaſe for years, in *Norfolk*, and his executor dwells at *Coventry*, *viz.* far from all theſe places; what kind of poſſeſſion ſhall the law judge the executor to have in every of theſe inſtantly upon the teſtator's death, and before he come where any of the things be, either to ſee or ſeiſe upon them? In all the particulars above mentioned the law is all one, except the caſe of the leaſe for years; which if it be of land, (as
Perk. 6. b. is moſt uſual) then, becauſe it is a ſettled and immoveable thing, the law doth not reach to it the foot of the executor, to put him in actual poſſeſſion, (for *Poſſeſſio eſt quaſi pedis poſitio)* until himſelf or ſome for him do actually enter thereupon. Nor indeed need the law help or ſupply the want of actual poſſeſſion in this caſe, as in the caſe of moveables; ſince land cannot be carried away as goods may, and therefore is not ſubject to purloining or embezzlement as moveables

ables are. But if the leaſe for years where of tithes, the executor, though in never ſo remote a place from them, ſhall be inſtantly upon the ſetting out thereof in actual poſſeſſion of them, ſo as he may maintain an action of treſpaſs againſt any ſtranger which ſhall take the tithes ſet out, though he nor any for him did ever before poſſeſs any of the ſaid tithes, or came near unto them. But if the caſe were of a leaſe for years of a rectory, conſiſting not only of tithes, but alſo of glebe-lands, into which entry may be made, as alſo livery of ſeiſin in it; then it may perhaps be ſome queſtion, whether ſuch an actual poſſeſſion in tithes ſhall be given by the law to an executor neglecting to enter, or not entering into the glebe-land. And ſo I leave the conſideration of chattels real.

45 E. 3. 17. 21 H. 6. 43.

Touching things perſonal, in which the executor hath ſuch an actual poſſeſſion preſently upon the teſtator's death, as that he may maintain an action of treſpaſs againſt any ſtranger taking them away, or ſpoiling them, though he nor any for him ever came near them; whether yet this ſhall be ſuch a poſſeſſion in the executors, and ſuch a coming of theſe goods to their hands, as to charge them with payment of debts and legacies, yea to make their own goods liable inſtead of theſe, is a point worthy of conſideration.

Co. lib. 5. 9 E. 4. 50. Plow. Com. 281. 32 H. 6 13. 14 H. 8. 22.

And, doubtleſs, this thoroughly ſifted will prove a caſe miſchievous whether way ſoever the law be taken. For firſt, it muſt be admitted, that without the executor's laying his hands actually and particularly upon the goods in the houſe or fields of the teſtator, whither the executor hath reſorted, he ſhall be ſaid ſo in poſſeſſion.

ſeſſion as to ſtand liable unto the creditors, ſo far as they extend in value, though, after, others purloin or embezzle them. Now then, if diſtance of place ſhall make difference, where ſhall be the bound and limit of that diſtance? And if the executor may come after a ſtranger's taking or poſſeſſing of the goods, it is miſchievous to creditors.

On the other ſide, if it ſhall be laid upon the executors to anſwer for all the goods whereof the teſtator died poſſeſſed, it will be miſchievous for them, and deter them from taking executorſhip upon them; ſince much purloining may be even of money, jewels and goods, by ſervants and others about the teſtator, or where theſe things be. I think therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the executors, they be prevented by others of laying hold on the teſtator's goods, ſo as that they may diſpoſe of them, eſpecially if it cannot be known by whom they are ſo purloined and embezzled, or if they be perſons fled or inſolvent; that then they ſhall not ſtand upon their ſcore, as goods come to their hands, in reſpect whereof creditors or legatees ſhall draw ſo much from them even out of their own goods, as in other caſes where they have no ſuch excuſe.

13 H. 6. c. 1.
33 H. 6. c. 1.

And of this mind I the rather am, becauſe I find the whole realm in parliament taking notice of ſuch prevention of executors coming to the goods of their teſtator, by the wrongful act and embezzlement of others, without any default in themſelves. And in this caſe the parliament hath given ſpecial remedy, *viz.* that writs ſhall be directed to ſheriffs, to make open proclamation

tion for the appearance of the parties delinquent in the King's Bench at the day limited; and in default thereof they ſhall be attainted there of felony, the writ being returned, executed, *viz.* Proclamation made. But note, that this proclamation is to be made two market days, within twelve days next after the delivery of the writ, and the laſt proclamation muſt be fifteen days before the day of appearance. And theſe proclamations muſt be made in ſuch cities, (boroughs, or places, ſaith the ſtatute) not expreſſing what is meant by the word *ſuch*, and therefore meaning doubtleſs thoſe in which the act of offence is committed. So that if the fact be not committed within the limits of ſome city, borough, or market town, no remedy is to be had by the ſtatute; for that the proclamation is to be made upon market days in the place where, *&c.* Now beſides, other places, even ſome boroughs, *viz.* towns ſending burgeſſes to the parliament, have no market, and ſo are no places within the act. Alſo two executors muſt require this writ; therefore where there is but one executor, no relief is given by this law, for it is penal, making it felony, and therefore ſhall not be extended by equity beyond the words. Laſtly, it extends but to the executors of lords and perſons of good degree, and only to the treſpaſſing ſervants of ſuch perſons, not to other ſtrangers, purloining the goods. But now who ſhall be ſaid to be perſons of good degree, not being lords, I will not much labour to decide; the rather, becauſe I have not heard, nor read, to my remembrance, of any action brought upon this ſtatute: but I think that good degree, muſt ſtay either at a knight, being

ing the loweſt dignity, or at a gentleman, being a degree of worſhip, as elſewhere is ſhewed, and not ſtoop any lower.

And the ſaid ſtatute ſeems in ſome ſort to imply an opinion this way which I incline to, in that it expreſſeth his purloining to be an impediment of the execution of the *will*, whereas if the executors ſhall anſwer and make good to creditors and legatees out of their own eſtate and goods, for theſe embezzled, the execution of the *will* is not hindered, but the executors are damnified in their own private value. Yet it may be ſaid, on the other ſide, that ſome things given *in ſpecie* by the *will*, ſuch a piece of plate, ſuch a furniture of a bed or chamber, ſuch a jewel, may be purloined, ſo that the legatees can never have them, and conſequently, the execution of the *will* be hindered, though ſome recompence be made by the executors: but how theſe legatees ſhall recover recompence in ſuch caſes, for that legacies are not to be recovered by ſuit at the common law, I muſt leave to the profeſſors of the common or civil law to inform. But if the executor be of ſecret aſſent to this embezzlement, whereof even the forbearance to ſue for the recovery of the things, or the value of them in damages, if known where they or the embezzlers be, is a ſhrewd evidence, or proof; then ſhall the executor be adjudged an haver of them, and ſo ſtand charged as having them: for *Pro poſſeſſore habetur qui dolo deſiit poſſidere.* And if in any caſe the taker by prevention from the executor, before his knowledge (perhaps) of the teſtator's death, or at leaſt, before his poſſibility of repair to the place where the goods were, to put them in ſure cuſtody, if, I ſay, ſuch actor keeps theſe goods from

from falling upon the ſhoulders of the executor, they ſhall ſurely fall upon himſelf, and make him chargeable at the creditor's ſuit, as an executor of his own wrong.

Of goods loſt by, or gotten from executors.

But put we the caſe (for thereunto ſhall be our next ſtep) that goods come fully into executors poſſeſſion and hands, but be again loſt or gotten from them without any default in them, ſhall they yet ſtand anſwerable out of their own eſtates for them? Surely hereabout two diſtinctions muſt be made, as I take it.

The firſt whereof I derive from our learning touching eſcapes of perſons taken in execution and impriſoned; if ſuch be reſcued by alien enemies, the ſheriff or gaoler ſhall not anſwer out of his own goods for this debt; otherwiſe, if it be done by ſubjects, againſt whom remedy is to be had by the court of juſtice: and ſo ſhould I think it to be touching executors, *viz.* that if enemies landing (as near the ſea-coaſt may eaſily and often happen) ſhall take away cattle or goods from an executor, hereby he ſhall be excuſed; contrariwiſe ordinarily, if the ereption or direption be by ſubjects known, and thereby actionable. Another difference I ſhall think may probably be taken from the rules of our learning touching bailment. If *A.* deliver goods to *B.* to keep as his own, or generally, *viz.* without any ſpecial undertaking by *B.* to keep them ſafely, and without any money or other valuable conſideration given for the ſafe cuſtody: here, if *B.* be robbed of them, he ſhall not make ſatisfaction to *A.* for them: and ſo if they be ſtolen from a ſervant or factor. But if they

33 H. 6. 1.
10 E. 4. 2, 3.
7 Eliz. Dy. 241.

Vide 29 Aſſ. p. 28. 8 E. 2. Fitz. Detin 59. 9 E. f. 90. 13 H. 7. 4. Co. lib. 4 f. 83, 84.

be taken away by a known treſpaſſer, not feloniouſly, ſome opinion hath been that the keeper ſhall make recompence, becauſe he hath remedy for recompence or ſatisfaction from the treſpaſſer. Yet of this later I ſhould doubt, becauſe *A.* himſelf as well as *B.* may have this action for damages againſt the treſpaſſer. Now an executor is of the nature of ſuch an one, having the cuſtody of another man's goods; and I have ſeen in a manuſcript entire, the writ of treſpaſs by the executor, expreſſing goods of the teſtator in the cuſtody of the executor to be taken from him: therefore methinks he ſhould no otherwiſe be charged than *B.* to whom goods were, as above is ſaid, delivered to be kept. For the executor haply ſhall have no benefit nor advantage by the executorſhip, all the goods not ſufficing, perhaps, to pay debts and legacies, which is the ſtate we moſt think of, *viz.* where goods want to pay debts and legacies; for where there wants not, the queſtion needs not be made. Yet a ſervant or factor, who hath wages for his ſervice, is not thereby made liable to ſatisfy for things in his cuſtody ſtolen, becauſe he hath not for this particular cuſtody any compenſation. So of an executor, if perhaps benefit might accrue to him by the executorſhip, as haply the diſcharge of a debt owing by himſelf, *&c.* Other caſes there be wherein the executor will ſtand more clearly diſcharged. As if the teſtator left a leaſe for years, eſtate by extent, wardſhip, or other goods, whereto he hath but a defeaſible title, and they be evicted after his death: ſo if he left a ſhip at the ſea with much goods and merchandizes, which are drowned in the return, never arriving in ſafety: ſo alſo if he left a flock of ſheep tainted with the rot,

In cuſtodia ſua exiſtit. It is ſo in F. N. B. Eng. p. 193.

not, which die ſhortly after him: in none of theſe three caſes, (doubtleſs) ſhall the loſs fall upon the executor. But to put a caſe of more doubt: what if a leaſe for years come to an executor ſubject to a condition for payment of rent, or a ſum in groſs, and the executor fails in payment, whether ſhall this loſs fall upon the executor to be made good to creditors or legatees out of his own ſubſtance or not?

To this, I muſt anſwer by this diſtinction, *viz.* If the executor had taken the profit of this land ſo long as to furniſh him with money for this payment; or if he had other goods of his teſtator's in his hand to ſupply the payment; then it is his default that the money is not paid, and he muſt bear the ſmart thereof, otherwiſe not; for he is not bound to make payment out of his own goods: yet he is a ſullen and unkind executor who will not ſo do, when as he may repay and ſatisfy himſelf by the profits thereof after. Like law, if the executor ſuffer a bond of a hundred pounds to be forfeit for not paying of fifty pounds, having ſufficient in his hands. So alſo of a recognizance, ſtatute or judgment, defeaſanced upon payment of a leſs ſum. Yea, I leſs doubt of all theſe caſes, than of the forfeiture of the leaſe for years: for haply the executor had time to have ſold the leaſe, and made money thereof towards the payment of debts; the omiſſion and neglect whereof may be imputed unto him, as a default juſtly occaſioning recompence to be by the law required from him. But perhaps, he may excuſe himſelf that he could not find a chapman who would give him to the value thereof. Hereunto yet reaſon can eaſily reply, that it had been Yet Quære.

much better to have ſold it under the value, than to have loſt the whole value, by expoſing or abandoning it to a total forfeiture.

CHAP. XI.

How far and where an executor, having Aſſets, *is chargeable or liable to an action.*

HAving conſidered what things ſhall come to executors, and be *Aſſets* in their hands for the performance of the will; let us now conſider what things the executor is bound to pay, ſatisfy, or perform, and where not; where he is chargeable, and where not; this being admitted, that he hath *Aſſets, viz.* ſufficient wherewith to perform,

Here we will conſider of theſe parts.

1. *Of debts by ſpecialty or record.*
2. *Of debts or duties by contract without ſpecialty.*
3. *Debts without either contract or ſpecialty.*
4. *Covenant by deed or ſpecialty.*
5. *Wrongs done by the teſtators.*

TOuching debts by ſpecialty, which are the moſt uſual and common obligements, it will not be impertinent to give a little light touching the validity of a ſpecialty, and the extent of it to executors. The moſt doubt will ariſe upon bills and ſuch writings obligatory made, not by ſcriveners or clerks in common form,

form, but by others otherwiſe, for haſte, or through ſimplicity. Thus long ſince we find a writing made by *A.* to *B. Memorandum*, that I have received of *B.* ten pounds, which I promiſe to pay, *&c.* This being ſealed, and delivered, was held a good obligation by *Brian* and *Cateſby*. So if the words had been only, I ſhall pay to *B.* ten pounds; whether ſuch words, or the like, as *covenant* or *grant* to pay, be in the form of a bill or bond, or in an indenture or articles, it is a ſufficient ground for an action of debt. And though it ſhould be miſwritten, *Wigint* for *Vigint*, or fitten for fifteen; yet ſhall it be favourably conſtrued, and held a good ſpecialty of debt, as hath been reſolved in theſe and like caſes; and ſo alſo notwithſtanding falſe *Latin* in the obligation, or the plural number for the ſingular number, or words of repugnancy or non-ſenſe; yet if there be words whereby it appears that *A.* is a debtor to *B.* and it be ſealed and delivered, it is a good writing obligatory; yea, though it want the words of concluſion, *viz. In witneſs whereof*; as the Lord *Dyer* reports to have been reſolved: although the contrary were held in four ſeveral Kings times before, as our books ſhew.

22 E. 4. 22.

19 R. 2, F. Det. 166. 9 H. 6. 7. 2 H. 4. 8. 2 El. M. 5. 9 H. 7. 16. 2 H. 4. 8. 28 H. 8. Dyer 22. 28 H. 8. Dy. 19 & 22. 40 E. 3. 1. 7 H. 7. 14. 8 H 8. 36. 22 H. 6. 15. 21 E. 4. 81. 3 H. 4. 17. 11 H. 4. 76.

Now any ſuch writing obligatory doth determine or drown any duty by contract, becauſe ſpecialty is of a higher nature. So as if *A.* and *B.* do bargain with *C.* to pay him a hundred pounds for corn, or other thing, and after *C.* take ſome ſuch writing obligatory as aforeſaid of *A.* now by this is *B.* diſcharged of the debt, becauſe he ſtood charged only by the contract which is extinguiſhed by the ſaid ſpecialty.

As for the extent and operation of theſe ſpecialties to and upon executors, we muſt know that an executor doth ſo repreſent the perſon of the teſtator, and is ſo included in him, as that every bond or covenant by the teſtator, made for payment of money or the like, reacheth to the executor, although he be not named, *viz.* that he doth not covenant for nor bind him and his executors by expreſs words, (and yet the heir not named is not bound, though there be never ſo great *Aſſets* or land deſcend unto him.) Now touching debts upon record much need not to be ſaid, (except of thoſe by ſtat. merchant :) for to debts and damages already recovered againſt the teſtator, and to debts by recognizance, the executor's liableneſs is ſomewhat clear and conſpicuous. Yet other inferior debts upon record may fitly be thought of, as iſſues forfeited, fines impoſed by juſtices at *Weſtm.* or at aſſiſes, quarter-ſeſſions, commiſſions of ſewers, or bankrupts, by ſtewards in leets, or the like; for all theſe are debts of record, which executors ſtand charged withal. So alſo if the teſtator were before auditors found in arrearages of account, being a bailiff or receiver; for theſe auditors are by ſtatute judges of record : but if the account were made only before the party to whom the arrearage pertained, or but before one auditor only, it is out of the ſtatute, which ſpeaks of accounts before auditors in the plural number ; therefore the executor not chargeable, becauſe teſtator might wage his law in thoſe caſes, not in the former.

So reſervation of rent, grant of annuity. 28 H. 8. Dy. 14 & 22. 47 E. 3. 22. 32 . 6. 32. 10 H. 7. 18.

No mention of executor in the judgment, yet he charged.

9 H. 6. f. 11. 11 H. 4. 6. 92. Otherwiſe of a guardian in ſocage, he is out of the ſtat. W. 2. c. 11 ut credo. Co. l. 10, 103.

And whereas exception was before made of a debt by ſtatute-merchant, it was by reaſon that the Lord *Brook* tells us, that if the conuſor

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in that caſe be returned dead, no remedy appeareth for the conuſee to have execution of the goods of the conuſor, but only of his lands. 36 H. 8. Br. ſtat. Mer. 43. If this ſhould be thus, it were a very miſchievous caſe: for many bound in ſtatutes have no lands, but leaſes, and goods of great value, and if by their death their goods and chattels ſhould be ſet free from this ſtatute, and the creditor without remedy, the law were defective: and it were ſo much the more ſtrange in this caſe, becauſe the ſtatutes of *Burnell* and *Mercatoribus* Acton. ſeem to pitch principally upon goods, and to tend unto aſſurance between merchants, who uſually are not landed men. But that the law doth give remedy in ſuch caſe, as well againſt the goods as lands of the deceaſed conuſor, appears by the reſolution of late made in what order and precedence ſtatutes are to be ſatisfied by executors, as after we ſhall ſee.

Of debts by contract without deed, as leaſes parol, &c.

CONtracts are of divers kinds; and we will begin with thoſe in the reality as moſt worthy. If therefore one be leſſee for years or for life, without any indenture or deed, (as he may be) and, his rent being behind, he dieth; now is the executor liable to the payment of this rent without any ſpecialty, for that his teſtator, if he had been ſued in his life-time, could not have waged his law. But if the leſſee for years in his life-time ſell or grant away his term or leaſe, although he ſtill lie at the ſtake for the rent to grow due after, until the leſſor accept the aſſignee for his tenant; yet if the leſſee die, 21 H. 6. 1. 44 E. 3. 42. 44 E. 3. 5. 7 E. 3. 11. 14 H. 7. 4. per Keble. Vide 8 E. Dy. 247. M. 22 & 33 E. in Com. Ban.

his executor ſhall not be charged for any rent due after the death of his teſtator. But what if the leſſee do not alien or aſſign his term, but die thereof poſſeſſed, and the executor, per-
Dr. & Stud. 121. ceiving the land not to be worth the rent, waiveth the ſame, yet the leſſor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the executor with the rent during the term? I anſwer, that if he hath *Aſſets*, that is ſufficient for payment off this and other debts, he cannot wave this leaſe, but ſhall be tied to anſwer this rent, though much more than the land is worth, for the taking of the leaſe is much of the nature of an obligation to pay money: yet becauſe it is yearly executory, the executor may wave it, in caſe his teſtator's eſtate will not ſupply and bear that loſs. But what if there be *Aſſets* to bear this yearly loſs for ſome years, but not during the whole term? I think in this caſe the executor muſt pay the rent ſo long as theſe *Aſſets* will hold out, and then muſt wave the poſſeſſion, giving notice to the reverſioner. And this I think he may do well enough, notwithſtanding his occupation of the land divers years after the teſtator's death, becauſe that was not voluntary, but as of neceſſity: yet this I leave as a *Quære*, to be well adviſed of with good counſel.

Of contracts perſonal.

WHere the teſtator might wage his law, there the action lieth not againſt the executor, as hath been touched: therefore he is not chargeable in an action of debt upon a ſimple contract, as by reaſon of this or that,

to his teſtator; yet, though it were the inheritance of land which was ſold, ſo as the ſale were without deed, or though by deed, yet if no counterpart were under the hand of him to whom the ſale was made. And the cuſtom of *London* to the contrary, *viz.* that an action of debt ſhould be maintained againſt executors upon a contract, was held void, at leaſt no good plea againſt other creditors, that ſuch a debt was recovered againſt the executor, or paid by him; as was towards the later end of the late Queen's time reſolved, though in the beginning of her time it was a demurrer. Yea, though ſuch a debt grew for the moſt neceſſary thing, *viz.* meat and drink, which bindeth even an infant to payment, yet will it not charge the executor of a man of full age. But this is meant where the contract was only by word: for where the teſtator putteth his ſeal to any deed or writing made upon ſuch ſale, this is more than a ſimple contract, and taketh from the vendee his wager of law, and ſo chargeth the executor. But if the teſtator ſeal but unto a tail or tally with ſcotches, expreſſing a debt, this is no ſuch ſpeciality as ſhall charge executors. Yet in ſome caſes without any ſeal at all the executor is chargeable. But although no action of debt lieth againſt the executor upon ſuch a ſimple contract, yet may the creditor in that caſe maintain an action upon the caſe, grounded upon the aſſumption implied, though not expreſſed, as now ſtandeth reſolved by all the judges of all the courts at *Weſtmin.* though heretofore there hath been much difference of opinion thereabout. And indeed, thus the executor is charged in matter for a ſimple contract, though not in manner of a debt, but as

41 E. 3. 13.
15 E. 4. 25.
Except by a Quo minus in the exchequer. So the King's debt.
Co. l. 9. f. 98. a.
So of accounts, except for the king. M. 32 & 33 El. in Com. Ba. by three judges, and 37. El. by all as I find in my report.
But Co. l. 5. f. 82. b. it is contrarily reported 3 El. Dy. 196. Demurrer.
9 E. 4. 51.
10 H. 7. 8.
15 E. 4. 16.
22 H. 6. 13.
19 H. 6. 116.
There though a common hoſtler or victualler truſt his gueſt, he loſeth his debt by his death.
Co. 9. 87. b.
12 H. 4. 23.
But if the ſum be alſo written on it, they are bound as by a deed. 28 H. 8. Dy. 2. a. Slade's caſe.
Co lib. 4.
Co. lib. 9. 17.
Pinchon's caſe.

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for breach of promiſe, making recompence in damages, in ſtead of the debt. And the chief reaſon for it is, becauſe the teſtator could not have waged his law in this action upon the caſe againſt himſelf, though in debt he might. Where the teſtator retaineth ſervants in huſbandry, or otherwiſe, and dieth, there being wages due to theſe ſo retained; the executor is liable to an action of debt for the ſame, by reaſon that the parties were compellable by ſtatute thus to ſerve, and therefore the teſtator could not have waged his law: but in caſe of ſervants not compellable, as waiters or ſerving-men as we call them, no action of debt lieth againſt the executor for their wages, though againſt the teſtator himſelf it doth; for the contract is ſufficient to charge him who made it. See of *Account* after.

2 H. 4. 14.

4 H. 6. 4. 8.

So 2 H. 4. f. 14. Servitors in the war by contract.

Where executors ſhall be charged, without either contract or ſpecialty.

WHere a priſoner oweth money to a gaoler or keeper of a priſon for his diet or victuals, and dieth, his executors ſhall be chargeable for this debt, becauſe it is for the commonwealth to have priſoners kept, which cannot be without affording them victuals. Alſo where one hath a patent or tally of the exchequer, to receive money of ſome cuſtomer, receiver, or other officer of the crown, and delivereth it to him, he then having money of the king's in his hands: if he pay not the ſame, but die, his executor, ſhall ſtand chargeable with the payment thereof. So for arrearages of account before auditors, if more than one, but this is debt of record in law.

27 H. 6. 4.
15 E. 4. 16.
Co. lib. 9. f. 87. b.
No. Na. Br. 131. a.
He muſt have a Liberate alſo.

27 H. 6. 4. b.
1 H. 7. 17.
2 H. 7. 8. b.
Clark of the hamper.

So

So if any lord of free tenants doth levy aid of them for the marriage of his eldeſt daughter, and he died before ſhe be married; ſhe may recover this money by an action of debt againſt his executor: but this is by virtue of a ſtatute. There is a preſident in the book of entries, of an action of debt againſt the executor of an heir, by which it ſeems that a man binding himſelf and his heirs, and leaving *Aſſets*, the heir taking the profit becomes ſo a debtor, that his executor ſhall be charged. And in the *Regiſter* there is a writ againſt the executors of the guardian of the ſpiritualties of the archbiſhop of *York*, for the debt of *B.* who died inteſtate, and whoſe goods came to the hand of the ſaid guardian, *viz.* the dean of *York*. In allowance whereof, there is a note added of the like writ brought in K. *R.* 2. his time, and that then a preſident was alledged of ſuch a writ in King *Edw.* 2. his time, againſt the executors of an ordinary, and that they were enforced to anſwer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* oppoſeth him. Alſo the *Rationabili parte bonorum* by cuſtom in ſome places is maintainable for the wife and children againſt the executor. But no action of account lieth againſt executors, except for the King. More hereof tit. *Wrong*.

10 H. 6. 24. 25. No. Na. Br. 82, 83. Weſt. 1. c. 35. Lib. Intr. 172. b.

Reg. orig. p. 141. Ceſt brief fuiſt en Court Anno 11 R. 2. ou fuiſt dit que termino Trin. 16 Patris Ed. tertii avi Reg nunc, meſne ceſtui Robert de P. fuiſt reponder au tiel brief qu' il' porta vers executors de ordinary.

11 R. 2. 16 P. 2.

11 E. 4. Fit. Ex. 77. See Co. Lib Intr. 564. Such actions in Yorkſhire.

Of covenant charging executors.

WE have already touched upon covenants, in part, *viz.* where they be expreſly for payment of money, ſhewing them to be in law, bonds, that is, writings obligatory, whereupon an action of debt may be brought as well as an action

Inter Andrews and Elſerig, circiter 33 El.

action of covenant, though the words of the deed bear the ſound and phraſe of a covenant. Yet in ſome caſes no action of debt lieth upon a covenant to pay money: as if *A.* covenant that his executor ſhall within a year, or ſuch a time, after his death pay ten pounds to *B.* now for that no action of debt was maintainable again *A.* himſelf, it lieth not againſt his executor, but only an action of covenant; as was held in the late Queen's time. So if the covenant be conditional; as thus, that if *C.* do not pay to *B.* ten pounds, then *A.* will pay it; and ſo alſo, perhaps, if the covenant be in the diſjunctive, *viz.* to do ſuch an act, or to pay ten pounds: now if the act be not done, yet no action of debt lieth for the money, but only an action of covenant. But now let us come to the caſes of meer covenants, and ſee which of them will charge an executor, and which not. If a leſſee for years covenants to repair the buildings, or to pay the quit-rents iſſuing out of the land let, there is little doubt but the executor, to whom the term cometh, muſt as well as his teſtator perform that covenant, although he did not covenant for him and his executors. And yet of theſe caſes doubt hath been: and touching the later, *viz.* of paying quit-rents, divers juſtices in Queen *Mary*'s time were of opinion, that it was a thing ſo perſonal, that it died with the perſon, and did not charge the executors; nor is there any contrary opinion expreſſed in the book. And ſince that time, *viz.* towards the end of Queen *Elizabeth*'s reign, in the action of covenant between the dean and canons of *Windſor* and *Hide* touching reparations, at the firſt, much opinion was, that only the perſon co-

Paſch. 33 El. inter Bor & Auſtine, in Com. Ba. Quære, If both be to be done by the covenantor. viz. 10 l. If not five, ſuch a day. So in Fenot's caſe. But where the leſſor did covenant to pay the Quit-rent, divers juſtices thought the executor not named, was not bound, 1 & 2 P. & M. Dyer 114. Note the Caſe is ſupra in marg. Paſch. 38 El. in Ban. Reg.

Co. l. 5. f. 24.

covenanting was tied to this performance; but after it was reſolved, that *that* covenant did run with the eſtate, and ſo both executor and aſſignee were bound to performance. But in that caſe it was ſaid by *Popham*, chief juſtice, that if the covenant had been to do a collateral act, neither the executor nor the aſſignee had been tied thereby: and therefore where a leſſee for years covenants within ſuch a time to build a new houſe upon the land, and dies before that time expired, I doubt whether the executor be bound to perform this or not; although it do concern the land let, ſo as perhaps the rent or fine was the leſs, in reſpect of this charge of new ſtructure or buildings; which is a great reaſon that the executor, though not named, ſhould be tied to the performance. But if the covenant had been to build a houſe elſewhere than upon the land let, or to do any other collateral thing, not pertinent to the land let; it is clear the executors were not bound to perform it. And yet in thoſe caſes, if there were a breach or non-performance in the teſtator's life-time, as that the time of performance were expired before his death, then it is clear the executors were bound to yield recompence by way of damages recoverable in an action of covenant, as both *Shelly* and *Fitzherbert* agreed: and ſo alſo did the Lord *Popham* agree in the ſaid caſe of *Hide*, as I find in my own report of that caſe; though in the Lord *Coke*, reporting only the point in queſtion, that be not mentioned. Now let us conſider of the caſe where there is no expreſs covenant at all, ſo much as for the leſſor himſelf, but only a covenant implied, or covenant in law, as we call it. As if leſſee for life make

Reſolved P. 39. Eliz. but not adjudged till M. 43 & 44 Eliz.

Tr. 28 H. 8. Dyer 14. There was a houſe to be built upon the land leaſed; and yet Baldus ſeemed of a contrary opinion.

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a leaſe for years, and die within the term, ſo as the leſſee is evicted by him in reverſion and remainder. In this caſe it was reſolved in the late Queen's time by three judges, *viz*, *Walſh*, *Brown* and *Dyer*, that by this covenant in law the executors were not chargeable; and in the ſame caſe, the Lord *Dyer* ſets down another reſolution after to the ſame effect. But Maſter Serjeant *Bendloes* reporting this later caſe to be of a leaſe made by † tenant in tail, *viz.* before the ſtatute of 32 *H.* 8. or not warrantable by it. ſets down the opinion contrarily, *viz.* that the action was maintainable againſt the executors. This may ſerve for inſtance, the like being in any other caſe where the leſſor hath not a good and a firm title, but perhaps ſubject to a condition, or other eviction, ſo as the leſſee cannot enjoy the land according to his leaſe.

M. 8 & 9 El. Dy. 257. Intrat. M. 7 & 8 Eliz. Swanno verſ. Strangſham & Searles.

Tr. 22 Eliz. Rot. 459. inter Broderidge and Windſor.

But this muſt be ſo underſtood, that no eviction or breach of covenant is in the life of the teſtator himſelf; for if that be, there is no queſtion but the executor ſtands chargeable: and therefore if one make a leaſe of land by deed wherein he hath nothing, this covenant is perhaps preſently broken; and though the leſſor die before an action of covenant brought, it will be maintainable againſt his executor, though no expreſs covenant. This is uſeful to be known, though in theſe days there be few leaſes ſo made, without expreſs covenant, and the executors alſo named. And where there is a ſpecial covenant

Nokes and Ander's caſe.

† By 32 H. 8. 28. Tenant in tail may by leaſe for 21 years, or three lives, bind the iſſues in tail, but not him in reverſion or remainder; but ſeveral things are to be obſerved in making the leaſe.

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in expreſs words, it doth qualify the covenant implied: ſo as although words of demiſe and grant tie the leſſor to a general warranty of the title againſt all men, yet it being after covenanted that the leſſee ſhall enjoy againſt the leſſor and his heirs or againſt all claiming under him or his anceſtors; now no eviction by or under any other title giveth cauſe of action, or bindeth the leſſor or his executor to make recompence.

Trin. 41 El. between Nokes & James, 4 Co. 80. 5 Co. 17.

Of Wrongs done by teſtators, and whether executors be liable to amends.

ALthough executors do repreſent the perſons of their teſtators; yet if the teſtator commit any treſpaſs upon the goods of another, or upon his perſon or lands, no action lieth for this againſt the executor; for *Actio perſonalis moritur cum perſona.* † So if a ſheriff, gaoler or keeper of priſon ſuffer one in execution for debt or damages to eſcape; though hereby the party at whoſe ſuit the execution was, be intitled to an action, *viz.* an action upon the caſe, againſt ſuch officer by the common law, and by ſtatute an action of debt; yet if he ſo ſuffering die, for that ſuch ſufferance was a wrong of the nature of a treſpaſs, no action lieth againſt his executor for the ſame. And upon the ſame reaſon, as I preſume, if one carry away his corn and hay, without ſetting out the tenth, although

But in equity the executor of an executor is liable for any waſt or wrong done by his executor, tho' not at law a perſonal tort which dies with the executor. 2 Chan. Ca. 217. 41 Aſſ. p. 15. 40 E. 3. Fitz. Ex. 74. Co. lib. 9. f. 78. a.

† Upon an eſcape, debt lies not againſt the heir nor executors; for it is a treſpaſs, que moritur cum perſona Dyer 271 & 322. 2 Bac. Abr. 245. Show. 176. 2 Mod. 145.

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the † treble value be recoverable againſt him in an action of debt; yet if he die before ſuch recovery, the action is gone, and lieth not againſt his executor; no, not although the teſtator were a leſſee for years, ſo as his ſtate come to his executor.

Like law in other penal ſtatutes: as, for arreſting one at the ſuit of *J. S.* without his privity or aſſent; § or for not appearing as a witneſs, being ſerved with a *Subpœna*, and having charges tendered, and many like: yea, if a leſſee for years commit waſte and die, no action lieth againſt the executor for this waſte. For all theſe caſes are within the rule of *Actio perſonalis moritur cum perſona.* And many other like caſes might be put, but theſe may ſuffice. Yet if a parſon, vicar, or other ſpiritual or eccleſiaſtical perſon, do ſuffer a ruin or decay of the houſes or buildings upon his ſuch ſpiritual benefice or promotion, and dieth; his executors are liable, by the ſpiritual or eccleſiaſtical law, to the repairing of ſuch ſpoil or decay. And becauſe ſome uſed fraudulently to grant away their goods, ſo as nothing ſhall be left to their executors; it was enacted *temp. Elizabeth*, that ſuch grantees of goods ſhould be liable to the
13 El. c. 16. ſucceſſor's ſuit for theſe dilapidations, as if they were executors.

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† This treble value is by 2 & 3 Ed. 6. c. 13.

§ The penalty for not appearing is by 5 El. c. 9. 10. l. and ſuch farther recompence, &c. For caſes on this ſtatute, ſee Str. 510. 2 Stra. 810. 2 Lord Raym. 1528. Barnard. 92. B. 45. 2 Stra. 1150.

As

As for one other caſe of this nature, *viz.* where an executor waſteth the goods of his teſtator, or an adminiſtrator the goods of his inteſtate, and dieth, whether his executor be ſubject to an action for this, or not; I adjourn the reader to that place where I ſhall treat of ſuch waſting or devaſtation by executors.

The executor of an executor who commits a Devaſtavit liable in equity. Chan. Ca. 303.

Unto this head not unfitly may be referred what before is ſaid of actions againſt the excutors of the debtor's heir, and the executors of the ordinary; for the ſpecialty binding to payment reacheth not to any of theſe: but becauſe their teſtators ſhould have paid theſe debts with the goods or profits of the lands of the debtor, and did not, but retained them to themſelves; therefore for this, as a wrong, are they ſuable, as I take it. So alſo by the ſame reaſon are the executors of an Adminſtrator chargeable, where he did neither pay the debts, nor leave the goods to the next adminiſtrator, but otherwiſe diſpoſed of them. Yet an executor is not chargeable in an action of detinue, nor of account, (except to the king) for the teſtator's detaining, and not paying or anſwering things received, or under his charge.

Fitz Ex. 77. I conceive no difference between this and the other caſes ſupra.

And the reaſon why, after account made before auditors, and the bailiff or receiver be found in arrearages and die, that in this caſe his executor is chargeable, is, becauſe the auditors are made judges by the ſtatute *Weſtm.* 2. *cap.* 11. ſo this arrearage which they have judged is a debt by record. 13 *Ed.* 1.

2 H. 4. 13. He may by A. admit. Co. l. 11. f. 38. H. 6. 35. a. Con. for arrearages of an account before auditors. 11 H. 5. 64. 91, 92. 9 H. 6. 11. 13 E. 1. Co. lib. 9. f. 87. a.

But if the caſe be put on the other ſide, *viz.* that the bailiff or receiver have been found in ſurpluſage upon his account, *viz.* that he hath laid out more in his lord's or maſter's buſineſs than

his receipts amounted unto, and then his lord or maſter dieth; now ſhall not he have any action againſt the executors for the ſurpluſage, becauſe it is out of the purview of the ſaid ſtatute.

CHAP. IX.

Of the order and method to be uſed by executors in payment of debts and legacies, ſo as to eſcape a devaſtation or charging of their own goods.

WE have gone through and diſpatched the two firſt propoſed parts, *viz.* 1. Touching the being of executors, and the manner of their being. 2. There having, and the manner of their having. We come now to the third part, *viz.* Their doing or diſpoſing of the teſtator's eſtate.

Now this conſiſts principally in the iſſuing of money, though partly alſo in delivering or aſſenting to the execution of legacies, not being money, but other goods or chattels bequeathed.

Money is to be iſſued by executors four ways ordinarily.

About the funeral of the teſtator.

About proving his will.

In paying of debts.

In paying and ſatisfying of legacies peculiarly.

3 Inſt. 202. As for the firſt, Burials be as of neceſſity for two reſpects, *viz.* 1. Of charity to the dead that he may be chriſtianly and ſeemly interred:

2. To prevent and avoid annoiance to the living, who by the very view of the dead carcaſe would both be affrighted, and within a few days diſtaſted at the noſe. We know that under the law the touching of a dead carcaſe made a man unclean, and to need purifying: nor can we eaſily forget what the ſiſters of *Lazarus* ſaid to our ſaviour touching their brother, when he had been dead three or four days, *viz.* that the taking of him then out of his grave muſt needs bring an noiſome ſavour. Hereabout therefore ſome experience is neceſſary, and that not only for fees to be paid, which in *London* amounts to a conſiderable ſum, ſpecially for ſuch as are to be buried within the church, but alſo otherwiſe, *viz.* for the pall or hearſe-cloth, the ringing, *&c.* As for feaſting and banqueting, it ſeems not to be congruent to the ſadneſs and dolefulneſs of the action in hand. But howſoever that be, yet where the teſtator leaves not ſufficient goods to pay his debts, feſtival expence is to be forborn, except the executor will out of kindneſs bear it with his own purſe; for dead debtors muſt not feaſt to make their living creditors faſt. I mentioned a conſiderable amount of funeral fees payable in *London*: and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kind, and eſpecially for thoſe who dying there are yet carried into their countries to be buried, the exaction be not either unjuſt altogether, or too onerouſly exceſſive: ſo alſo for much ringing, contrary to the canon made at the convocation in the firſt year of King *James*.

It is no good cuſtom in London, and againſt reaſon, that he that is not any pariſhoner, but paſſing through the pariſh, lies at an inn for a night, ſhould be forced to be buried there, or to pay as if he had been buried there Hob. Rep. 238. Topſal & Ferrers. Hob. f 175. S.C. 1 Rol. Abr. 559. pl. 1. S. C.

The next thing mentioned to juſtifie and occaſion expence is the proving of the will. But

this way a greater diſburſment (except for riding charges, or by reaſon of oppoſition by a *Caveat* put in, or the like) will not ſtand allow-
21 Hen. 8. cap. 5. able, than is preſcribed by the ſtatute made in the time of *Hen.* 8. whereby the fees of ordinaries, and their ſcribes, regiſters and officers be limited. And it is ſtrange that theſe bounds have been tranſgreſſed, the rather, for that long
13 Ed. 3. c. 4. before in the time of King *Edw.* 3. by an act of parliament it is provided, that the King's juſtices ſhould, as well at the King's ſuit as at the parties grieved, enquire after ſuch oppreſſions or extortions, for ſo they be called; yea, *St.*
Do & Stu. l. 2. cap. 10. *Germ.* who was no ſtranger to the civil and canon law, as appears by his book, ſaith, that the ordinary ought to take nothing for the probate, if the goods ſuffice not for funeral and debts; but he means only that conſcience is againſt it.

Vide Vern. 143. Harding v. Edge, & 2 Vern. 88. Searle v. Lane in Mich. 1688. Where it appears that a decree of Chan. is equal to a judgment at law. And tho' an executor cannot defend himſelf at law, by pleading he has no Aſſets ultra to ſatisfy the decree; yet he may defend himſelf by a bill in that court.

Now we come to the third occaſion of diſburſement, *viz.* payment of debts, which is the main part of our buſineſs. We have before ſeen what debts lie upon executors having *Aſſets* to pay them; we are now to ſee in what order they muſt pay them, as well *ut ſint fidi diſpenſatores*, as for their own indempnity, *ne quid res ſua capiat detrimenti.* To put themſelves into the better order or method of handling theſe things, we will ſort our debts into their ſeveral kinds: Thus,

They are of theſe three ſorts, *viz.* either
debts of or upon record;
Or, debts by ſpecialty;
Or, debts without ſpecialty.

The debts upon record may be again divided into four ſorts or kinds, *viz.*

Debts

Debts to the King or the crown.

Debts by judgment or recovery in ſome court of record.

Debts of recognizance.

Debts by ſtatute-ſtaple, or ſtatute-merchant.

Among theſe, the debts of the crown are to have the firſt place of precedence; ſo as if there be not come to the executor goods of greater value than will ſuffice for the ſatisfaction of theſe, he is not to pay any debt to a ſubject; and if he be ſued for any ſuch, he may plead in bar of this ſuit that his teſtator died thus much indebted to the King, ſhewing how, *&c.* and that he hath not goods ſurmounting the value of that debt. Or, if the ſubject's purſuit be not ſo by way of action, as that the executor hath day in court to plead, but be by way of ſuing execution, as upon ſtatute-merchant or ſtaple; then is the executor put to his *Audita Querela*, wherein he muſt ſet forth this matter. And there is great reaſon why the King's debts ſhould thus be preferred before any ſubject, *viz.* for that the treaſure royal is not only for ſuſtentation and maintaining of the king's houſhold, but alſo for publick ſervices, as the wars, *&c.* as appears by the ſtatute 10 *Rich.* 2. *cap.* 1. And therefore it is, as I conceive, that *Bracton* ſaith of the treaſures or revenues royal, *Roborant Coronam*, they do ſtrenthen or uphold the crown. And for the like reaſon, as I think, did God enact touching the poſſeſſions of the crown, that if they were given to any other than the King's own children, they ſhould revert and come back to the crown the next jubilee, which was once in fifty years. *ſed de hoc ſatis.* But this priority of payment of the King's debt be-

M. 33 & 34. Eliz. the lady Walſingham's caſe in Com. Ban. & Tr. 39 Eliz.

Prerogative.

Lib. 1.

21 E. 4. 21, 22. So muſt it be pleaded M. 33 & 34 Eliz.

fore the debt of any ſubject, is to be underſtood only of debts by or upon record due to the King, and not of other debts. If any aſk how the King ſhould have any debts which ſhall not be of record, ſince by the ſtatute 33 of King *Hen.* 8. *chap.* 30. it is enacted, that all obligations and ſpecialties taken to the uſe of the King ſhall be of the ſame nature as a ſtatute-ſtaple: to this I anſwer, that there may be ſums of money due to the King upon Wood-ſales, or ſales of tin, or other his minerals, for which no ſpecialty is given; ſo alſo for amercements in his courts-baron or courts of his honours, which be not courts of record; the like of fines for copyhold eſtates there; ſo of the money for which ſtrays within the King's manors or liberties are ſold. Alſo, as the law hath lately been taken and ruled in the exchequer, even debts by contract due to any ſubject are by his outlawry, or attainder forfeitable to the crown. Yet neither theſe, nor thoſe due to ſuch perſon outlawed or attainted by bond, bill, or for arrearages of rent upon leaſe, are or can be any debt of record, until office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appear by any record, before office found, that any ſuch debt was due to the perſon outlawed or attainted. Thus are not theſe debts to the crown to have priority of payment before the ſubject's debts, though the King's debts of record are ſo to have. So that if a ſubject to whom the teſtator was indebted by ſpecialty ſue for this debt, the executor muſt plead, that the teſtator died indebted thus much to the King by record, more than which he left not goods to ſatisfy; if the truth

Debts by contract forfeitable by outlawry or attainder.

And muſt plead the record in certain, as was

of

of the caſe be ſo: for if there be ſufficient to ſatisfy both, then the ſubject creditor is not to ſtay for his debt till the king's debt be levied. And if the ſubject creditor ſue execution upon a ſtatute, ſo that the executor hath no day in court to plead this debt to the King, then is the executor put to an *Audita Querela*, wherein he muſt ſet forth the matter, and ſo provide for his own indemptnity. But what ſhall we ſay of arrearages of rent due to the King? Surely where it is a fee-farm rent, or other rent of inheritance, I ſee not how it can come under the title of debt, ſince for it no action of debt is maintainable ſo long as the ſtate continueth in him to whom it grew due; and I find that the Lord *Dyer*, *M.* 14. *Eliz.* ſaid, that the King could but only diſtrain for his rents, and not otherwiſe levy them of lands and goods; and that the King by his prerogative may diſtrain in any other lands of his tenant, our books tell us, but no more. Yet I know it hath been otherwiſe done of late in the *Exchequer*, which if it have been the antient and frequent uſe of the *Exchequer* it will ſtand at law, though unknown to the Lord *Dyer*. Now rent upon a leaſe for years differeth from the other, ſince for the arrears thereof an action of debt lieth. But how can either of theſe be debts of record when the non-payment may be either in the court of *Exchequer*, or to the receiver general or particular? And how then can there be any certain record of the non payment, ſo as to make any certain debt upon record: we know ſtatutes have been made to make the lands of receivers ſubject to ſale, for ſatisfaction to the crown; and beſides that, ſome antient patents direct the

held in the caſe of the Lady Walſingham, *M.* 33 & 34 *Eliz.* But it ſufficeth to ſay, by a record of the exchequer, as was held Tr. 39 *Eliz.* in Ban. Reg.

payment of fee-farms into the hands of ſheriffs. The ſtat. of *Weſtm.* 1. *cap.* 19. provides remedy for the King againſt ſheriffs not anſwering the debts of the crown by them received: ſo as the King's farmer or debtor may have paid his rent or other debt, and the crown have not yet received it. Of fines and amerciaments in the King's courts of record, there is no doubt but they are debts of record.

Come we now to the debts of ſubjects, and firſt thoſe of record. Touching which I ſhall not be able to hold ſo good a method, and ſo well to handle things by parts, as I would; for that the parts ſo ſtand in competition one with another for precedency, as that they muſt of neceſſity thereabout conflict and interplead one with the other, and conteſt one againſt the other: yet for the reader's better eaſe, and ability to find out that which may concern him in his particular caſe, I will, in the beſt ſort I can, place them in ſeveral rooms or ſtations. Firſt, conſidering how it ſhall ſtand between one judgment and another, had either againſt the executor or teſtator. Secondly, how between judgments and ſtatutes or recognizances. Thirdly, how between recognizances and ſtatutes. Fourthly, how between one recognizance and another. Fifthly, how between one ſtatute and another. Adding to each ſome obſervations incident.

Now, next to the debts of the crown, are judgments or debts recovered againſt the teſtator to have priority or precedency in payment, as being of an higher nature or more dignity than any other: for that ſtatutes and recognizances, though they make debts upon record,

yet

yet are they begotten but by voluntary consent of parties; whereas in every judgment there hath been a course and work of justice against the will of the defendant, as is presumed, and this in a court of justice, and the records of such judgments are entered in publick rolls, not kept or carried in pockets or boxes, as statutes, and, until inrolment, recognizances are. Therefore executors must take heed that judgments against their testators, (before debts any other way) if they have not sufficient for both, be first satisfied, least they draw the burthen of this debt upon their own backs. Now their way to help themselves, being sued or pursued for other debts, is the same before delivered touching debts upon record to the crown, *viz.* by plea, where they may plead, as in *Scire facias* upon a recognizance, or suit upon bond; and by *Audita Querela*, where they cannot plead, as when execution is sued upon a statute. And if they had no warning in the *Scire facias*; but upon *Nihil* returned, the judgment passed; there also the executor may be relieved by *Audita Querela*; because there was no default in him that he did not plead, or set forth the judgment upon the suit in the *Scire facias*. Nor will it be any plea for the creditor by stat. to say that his statute was acknowledged before the judgment, and so is more ancient; for a later or more puisne judgment is to be preferred before a statute in time precedent. But if this judgment be satisfied, and is only kept on foot to wrong other creditors, or if their be any defeasance of the judgment yet in force; then the judgment will not avail to keep off other creditors from their debts. And thus much touching debts by judgment

Co. l. 5. f. 81. So Wray and Gaudy, inter Bond and Bales, 28 El. vel. circiter.

Yea though a writ of error by the executor to reverse the judgment, yet suffering a statute to be executed, must pay of his own. Read and Beach. Lock's case. P. 43 Eliz Barre. So held in Read's case sup. Vide 12 H. 7. Kel. 24, 25. to like purpose.

Co. l. 4. f. 59. So Periam in B.C. inter Charnock & Winsly, 34 Eliz. vel circitor.

Co. l. 5. f. 28. Co. l. 8. f. 132. So held in 15 & 16 El. So in the Scire facias by Bond against Boles it was held.

ment, *viz.* how they ſtand in priority before other debts by ſtatute or recognizance. Now to ſee how they ſtand among themſelves, let this be obſerved, *viz.* That between one judgment and another had againſt the teſtator precedency or priority of time is not material; but he which firſt ſueth execution muſt be preferred, and before any execution ſued it is at the election of the executor to pay whom he will firſt: yea, if each bring a *Scire facias* upon his judgment, the executor may yet confeſs the action of which he will firſt, notwithſtanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the defendant may plead generally, that he hath fully adminiſtred before the *Scire facias* brought, without ſhewing that he did adminiſter in payment of debts of as high nature; yet that muſt be proved upon the evidence, elſe the trial will fall out againſt the executor. Thus have I delivered the moſt material things, in my apprehenſion, touching debts by judgment: yet thereabout I will add, for the better information of the reader not ſtudied in the law, theſe few things. Firſt, that what hath been ſaid, is only to be underſtood of judgments againſt the teſtator, and not of any againſt the executor himſelf; for of thoſe, being but debts of ſpecialty at the time of the teſtator's death, we ſhall ſpeak after. Secondly, what is ſaid of the teſtator, in caſe of an executor immediate, is likewiſe to be underſtood of the teſtator's teſtator, in caſe of executor of an executor: for where *A.* makes *B.* executor and *B.* makes *C.* executor, there the goods which came from or were left by *A.* be not in the hands of *C.* liable to the judgment had againſt *B.* nor, on the other ſide, are the goods of *B.* in the hands of *C.* ſubject to the judgments

9 E. 4. 14, 15. Quæ. of arrearages of account before auditors without ſuit; for the executors are charged by Judgment of the auditors by ſtat. W. 2 judgment of record.
10 H. 6. 24. 25. Bro. Det. 183.

judgments had againſt *A.* And the like is to be underſtood of ſtatutes, recognizances and bonds, as elſewhere is ſomewhat touched. Thirdly, recoveries or judgments by meer confeſſion, without defence, are yet of the ſame nature, and to have the ſame reſpect, as other recoveries upon trial or otherwiſe: for though they may ſeem to be but of the nature of recognizances, which be *debita recognita*; yet do they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it but in caſe of a recognizance, it is not ſo, for there uſually no action is entered, nor debt demanded. Fourthly, the foreſhewed reſpect to debts by judgment is not to be incloſed within *Weſtminſter-hall*, and be reſtrained to the four courts there, but may and muſt extend itſelf to judgments in other courts of record, *viz.* in cities and towns corporate, having power by charter or preſcription to hold plea of debt above forty ſhillings; as in *London*, *Oxford*, &c. For although there execution cannot be had of any other goods than ſuch as be within the juriſdiction of that court; yet if the record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the *Benches*, ſo execution may be had upon any goods in any county of *England*. Fifthly, in caſe where the teſtator was bound in a recognizance, and a *Scire facias* brought againſt him, and thereupon judgment given; although this judgment be not, *quod recuperet*, as in caſe of actions of debt, but, *quod habeat*, *executionem*; yet ſince execution is the life, fruit and effect of all judgments, this may now well ſtand for a debt by judgment, as I take it.

Quære of judgment in a writ of annuity for arrearages after.

Of

Of recognizances and ſtatutes.

NExt unto debts by judgment are thoſe by ſtat. or recognizance to be regarded by the executor. And becauſe I find no difference of priority or precedency between theſe two, I therefore rank them together: yet one reaſon of preferment given to judgments before ſtatutes in *Harriſon*'s caſe, *viz.* that the one remains a record upon a roll in the king's court, whereas the other being carried in the pocket of the conuſee is more private; this I ſay, ſhould give priority alſo to recognizances before ſtatutes: as alſo another reaſon, for that ſtatutes are not properly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the ſtat. is the more expedite remedy, ſince thereupon execution may be taken out without a *Scire facias* or other ſuit, which cannot be in the caſe of a recognizance: for there, if a year be paſt after the acknowledgment, no execution can be ſued out againſt the party himſelf acknowledging it, without a *Scire facias* firſt ſued out againſt him; and if he be dead, then though the year be not paſt, yet muſt a *Scire facias* be ſued, and thereupon the executor defendant may plead ſome plea to hold off the execution for a time. But, this notwithſtanding, the executor may ſatisfy the recognizance before the ſtatute, at leaſt if he do it before execution ſued thereupon; for they ſtanding in equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were firſt or more ancient; nor between one ſtatute and another doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the conuſor it doth;

Lib. 5. 28. b.

Before Sci. fac. not after voluntarily, but if levied by writ of extent, is good.

doth; but as for his goods in the hands of his executor, whoſoever firſt getteth hold of them by his execution, ſhall have the preferment. And before ſuing of execution, the executor may give precedence or preferment to whom he will. But now ſome may object, that there is no courſe nor writ of execution for any ſuch conuſee againſt the executor; and if ſo, then ſtatutes-merchant and of the ſtaple are in vain ſpoken of; and it is true that maſter *Brook*, after chief juſtice of the *Common Pleas*, in his new caſe, profeſſeth, that he knew not any remedy for the creditor out of the goods of the conuſor after his death. But if this ſhould be ſo, the law were very defective, ſince the ſubſtance of many, eſpecially of merchants, for and among whom the ſtatute-merchant was provided, conſiſteth uſually more in goods than lands: beſides, the plea of *Harriſon*, adminiſtrator of the goods of *Sidney*, in bar of *Green*'s action of debt upon an obligation, *viz.* that the inteſtate ſtood bound in a ſtatute ſtaple to *J. S.* and *Green*'s reply thereunto, that there were indentures of defeaſance, no covenant whereof was broken, and the reſolution of the judges, that the ſaid matter in the replication was good to avoid the defendant's plea; all this, I ſay, (and the reſolution of the judges of the *Common Pleas* in that caſe, and in the caſe between *Pemberton* and *Barram*, as alſo in the *King's Bench* by *Popham*, and the reſt of the judges, that executors muſt ſatisfy judgments before ſtatutes, and ſtatutes before obligations) had been idle, and favouring of groſs ignorance, if no execution at all could be had againſt the executor of him bound in a ſtatute; and then ſhould *Green* have demurred upon the plea of *Harriſon*, and need not

Bro. No. 294 & ſtat. Mar. 43.

Co. l. 5. f. 28. b. H. 30 El. Rot. 119.

P. 32. El. Rot. 235. in Co. 3.

See Co. lib. 5. 91. execution againſt an executor upon a ſtatute. Semaine's caſe. Co. lib. 5. f. 28. So it ſatisfied though not diſcharged.

not to have pleaded that other matter: but none of the judges or ſerjeants ever conceited any ſuch matter. That which there was replied, *viz.* that the ſtatute was not forfeited, is here to be remembred as good matter both againſt ſtatutes and recognizances; and that whether the recognizance have a defeaſance, or a condition not broken, ſo that the recognizance is not forfeited. In none of theſe caſes is the executor hindred from payment of debts by ſpecialty, nor can he be juſtified or excuſed if by colour thereof he refuſe ſo to do: and indeed elſe might creditors be exceedingly defrauded by recognizances for the peace and of good behaviour, *&c.* and ſo by ſtatutes for performing covenants touching the enjoying of lands, theſe ſhould keep off the payment of debts; and yet themſelves perhaps never be forfeited, nor the ſums become payable.

Of debts by ſpecialty.

NOW come we to debts due by ſpecialty, *viz.* Bond or bill, (of which nature the greateſt number of debts are.) Let us then ſee what courſe the executor muſt or may hold for ſatisfaction of theſe, admitting that the teſtator ſtood not indebted to any record, or that no forfeiture is of any ſuch debt, or that there be goods in the executors hands above the amount of ſuch debts by record. This, I ſay, *dato*, then according to the rule, *Proximus quiſque ſibi*, the executor may firſt ſatisfy himſelf of ſuch debts as the teſtator by ſpecialty owed him: for ſuch debts are not releaſed by the creditor's taking upon him to be executor to the debtor; though, on the other ſide, if the creditor make his debt or executor

executor, this is a releaſe of the debt. Although it be given out or commonly ſpoken in the general, that an executor may firſt pay himſelf; yet it is to be underſtood with this caution or condition, *viz.* That the debt to him be of equal height or dignity with the debts to others, according to the rule, *In æquali jure melior eſt conditio poſſidentis:* for if his teſtator were indebted to other men by any ſtatute, judgment or recognizance, and to him whom he maketh executor only by bond or other ſpecialty; then may he not firſt pay himſelf, that is, by paying of himſelf leave them unpaid whoſe debts are of an higher nature; but if there be ſufficient for ſatisfaction both to them and himſelf, then is it not material which he firſt payed. Now touching the debts to other men, the executor hath power to give preferment in payment to whom he will: ſo that if the teſtator left but 100 *l.* being indebted to *A.* 100 *l.* and to *B.* 100 *l.* by ſeveral obligations; the executor hath power to pay *B.* his whole debt, and to leave *A.* altogether unpaid any part of his debt, ſo as he have not commenced any ſuit before payment to *B.* But yet herein this difference is to be taken and obſerved by executors, that if the time of payment upon the bond of *B.* were not come at the time of the teſtator's death, then may not the executors, before the money to *B.* become payable, pay him, and leave *A.* unpaid. whoſe money was preſently due. Yet if a *A.* forbear to demand or ſue for his debt till the debt of *B.* become alſo payable; then is it at the *will* of the executor to pay whether of them he will, ſo as the other may loſe his whole debt, if the goods will not ſuffice to pay both? What

28 H. 8. Dy. 22. Doct. & Stud. c. 10. p. 78.

if

if *A.* have only by word demanded his debt, and not by ſuit, before the debt to *B.* become payable? whether doth that hinder that the executor may not now, when the money to *B.* is alſo payable, pay him, and leave *A.* unpaid? And hereunto *St. Germ.* anſwereth negatively, making this verbal demand to be idle, and of no value: yet he addeth, that if *A.* have commenced ſuit before the debt to *B.* become payable, yet if the executor can delay the ſuit till the debt of *B.* become payable, ſo that *A* can get no judgment before that time, and before *B.* hath commenced ſuit upon his bond, then may the executor confeſs his action, and ſo pay his debt, leaving *A.* unpaid. But of this I make ſome doubt, for that I find in time of King *Edw.* 4. ſome admittance, that if *A* having a tally, patent, or other warrant from the King, for receipt of money of or from a cuſtomer or receiver, where other had like warrants before him, but *A.* making the firſt demand; now muſt the officer firſt pay him, or elſe himſelf ſhall become debtor to him, if he firſt pay others whoſe demands were after made, though they had warrants before *A.* Likewiſe there is, as to me ſeems, ſome admittance in the ſame book, that the very demand made by a creditor of his debt from an executor, who hath then *Aſſets* in his hands, doth entitle the creditor to recover damages againſt the executor out of his own goods: which if it be ſo, then doth even the verbal demand lay ſome tie or obligation upon the executor for payment. But hereabout I lay down nothing peremptorily. We partly may diſcern by the premiſſes how the executor is to guide himſelf, in the caſe where there

Dr. & St. p. 78. Quære if then he may not plead this payment poſt ult. contin. againſt A. as he may plead it againſt other ſuits after commenced, Co. lib Intr. 148, 269, 149. a.

there be divers debts by ſpecialty, all due and payable at the teſtator's death, before any ſuit commenced for any of them: for in that caſe clearly the firſt verbal demand gives not any precedence, all being due, and ſo ſtanding in equal degree. And this is implied in many books, † making the commencement of the ſuit only that which entitles to priority of payment, or at leaſt reſtrains the election of the executor. Yet, admit that one creditor firſt doth begin ſuit, if others alſo after ſue before he be paid, or have judgment; now cannot the executor pay him firſt who firſt commenced ſuit, but he who firſt hath judgment muſt firſt be ſatisfied. And the executor may herein yield help to one before the other, *viz.* by eſſoigns, imparlances or dilatory pleas to the one, and by quick confeſſion to the other's action: for he is not bound againſt his will to ſtand out in ſuit, and expend coſts, where the debt is clear: nor is this covin, but lawful diſcretion, which conſcience will alſo approve, ſome good conſideration inducing. Nay, after ſuit commenced, yet until the executor have notice thereof, he may pay any other creditor, and then plead that he hath fully adminiſtred before notice. Nor is the ſheriff's return of ſummons or diſtreſs ſufficient cauſe of notice; for the ſummons might perhaps be upon his land: but if it were to his perſon, it is notice ſufficient; and then, to ſave himſelf, he muſt ſay, that he was not ſummoned till ſuch a day, before which he had fully adminiſtred.

41 E. 3. Fitz. Ex. 68. 6 & 7 El. Dy. 232. Vide 21 H. 7. Kelw. 74. So. Walmſley Juſt. P 39 El. z. in error at Serjeants Inn. Co. lib. Intr. 286.

ſuch a recovery by confeſſion is pleaded againſt another, and admitted good, & f. 148, 149. Do. & St. p. 78. b.

† It is the notice of the ſuit.

Yet doubtleſs the executor may be arreſted at the creditor's ſuit in ſome ſort, which yet ſhall be no ſufficient notice of this debt. As for the purpoſe, if he be ſued by *Latitat* out of the *King's Bench*, this, ſuppoſing a treſpaſs, gives no notice of a debt, ſo alſo of a *Subpœna* out of the *Exchequer*; but the original returnable in the *Common Pleas* expreſſeth the debt, and ſo in ſome ſort doth the proceſs thereupon, And there it ſeems by ſome books, that if it be laid in the ſame county where the executor dwells, he muſt take notice of it at his own peril. But this I take not to be law, nor is there any great opinion that way; and although, to make it more clear, the executor in King *Hen.* the fourth his time, eſtranging himſelf from notice of the ſuit before payment to others, did alledge, that the action was laid in a foreign county; that is no great proof, that if his abode had been in the county where the action was brought he muſt have taken notice; but thus it was clearer, and a ſurpluſage hurts not.

So alſo was it ſaid Tr. 29 El.

Now between a debt by obligation and a debt for rent or damages upon a covenant broken, I conceive no difference, nor any priority or precedency; but it is at the executor's diſcretion to pay firſt which he will, as if all were by bond. So alſo of rents behind and unpaid, as I conceive; but touching them, principally intending rents upon leaſes for years, divers conſiderations are to be had, and ſome diſtinctions to be made. As firſt, between rent behind at the time of the teſtator's death, of which *that* before ſaid is to be underſtood, and *that* which groweth behind, after; next between ſuit for the rent by action of debt, and diſtreſs and avowry.

As

As to the first difference, if the rent grew due since the testator's death, then is it not accounted in law the testator's debt; for only so much is in law accounted *Assets* to the executor, as the profits of the lease amounted to over and above the rent; so as for *that* rent so behind the executor himself stands debtor, as hath been resolved, and therefore he is suable in the *Debet* and *Detinet:* whereas for rent behind in the testator's life, and all other the debts of the testator, he must be sued in the *Detinet* only. Hence it must follow, as it seems, that an executor sued for debt upon a bond or bill cannot (except in some special cases) plead a payment or recovery of rent grown due since his testator's death; though of rent behind at the time of his death it be otherwise. And yet here again another difference or distinction is to be taken, *viz.* where the profits of the lease exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elsewhere is shewed, the executor, if he have *Assets*, is tied to the holding of the lease, and payment of the rent, and consequently doth so much of that rent, as exceeds the yearly profit, stand in equal degree the testator's debt, with other debts by specialty. And yet again to re-consider this point, what if the debts of the testator by specialty payable presently at his death, or before the time that any rent can grow due upon this lease, shall amount to the full value of the testator's goods; may not then the executor, though he do not pay those debts before the rent-day, (for that would make the case clear) waive the term? for if he may, then haply, if he do not so, but shall by payment of

Cro. Jac. 238. Lord Rich. v. Frank administrator, for rent due after the death of intestate; adjudged upon motion in arrest of judgment, that the action well lay in the Debet and Detinet. Pas. 8 Jac. B. R. though the like judgment in B. R. in the case of Body and Hargrave given Mich. 41 El. was afterwards reversed in Camera Scaccarii. Cro. El. 711.

Point left unresolved.

any of this rent want goods to pay any part of the debts by ſpecialty, it may lie upon himſelf and his own goods, as happening by his own default. But on the other ſide it may be ſaid, that he could not waive it ſo long as he had *Aſſets*, becauſe thereby he ſtood equally liable to pay *that* debt, being once due, as the other debts by ſpecialty: on the other ſide it may be ſaid, that though the debts for rent and upon bond ſhall be admitted to be in nature equal; yet the caſe being put of rent not due at the time of the teſtator's death, it was not then a debt nor duty; whereas a bond makes a preſent debt and duty, though not preſently payable, the day of payment being not yet come; ſo as this later is diſcharged by a releaſe of debts or duties, and ſo is not the former. So to leave that point unreſolved, let us next ſee whether in ſome caſe, though the rent exceed not the yearly value of the land, yet even that payable after the death of the teſtator may not ſtand in moſt part, if not wholly, upon the teſtator's ſcore, as his debt, as well as if it had been payable before his death. *Poſito* then, that the whole or half year's rent is payable at the *Annunciation* of our lady, and that the teſtator dieth two or three days or ſome like ſhort time before that feaſt; now certainly ſhould the law be unreaſonable, if it ſhould lay this debt upon the executor's ſhoulders, in reſpect of thoſe few winter days profits which he took. But ſurely, ſince the taking of the profits induced the law to lay the rent upon the executor as his own debt; therefore, as where the executor had the profits for the whole year or half year, except ſome few days incurred in the teſtator's life-

Tho' they have the land as executors, yet nothing ſhall be employed to the execution of the will, but ſuch profits only which are above that which is to make the rent, and therefore ſo much of the profits, as is to make or anſwer the rent, they ſhall take to their own uſe, and they ſhall be charged for it in the Debet and Detinet. Pop. 120. per Popham. And if the land be not more worth than the rent, it is a good plea to ſuch action in the Debet and Detinet, for in ſuch caſe he is to be charged in the Detinet only. Vent. 271. per Cur.

time, thoſe few days will be unregarded, according to the rule, *De minimis non curat Lex*, and the whole rent ſhall lie upon the executor as his own debt; ſo on the contrary part, when the whole year or half year's profit, except ſome few days, incurred after the teſtator's death, the rent, becoming payable ſo inſtantly after the teſtator's death, muſt in reaſon lie wholly upon the teſtator's eſtate, as to me it ſeems. What if to this I add, that the teſtator's cattle wherewith the ground was ſtocked, do depaſture and devour the profits all the time after the teſtator's death, till the day of payment of the rents? Nay, if the rent were payable at *Mich.* and the *Annunc.* and the teſtator dies a few days after *Mich.* the rent being of or near the value of the land, it will then be hard that the executor ſhall for this winter-profit pay the rent out of his own purſe, eſpecially if the whole year's rent be payable at that one day, as in ſome caſes it is; or if the whole year's profits were taken in the ſummer, as in caſe of a leaſe of tithes: it is ſo alſo of meadow grounds, uſually drowned in the winter. So if the leaſe be then to end, not having a ſummer half-year to ſucceed and make amends for the winter: or if the winter half-year be the later half, the leaſe beginning at *Lady-day*, ſo that there is but a ſummer for each winter following, and not any for the winter paſſed. Of like conſideration with theſe is the caſe of a leaſe of woods for a rent, which being fellable but once in eight or nine years, now if the leſſee having made the laſt ſale and felling before his death, the law ſhould caſt the rent upon the executor's own eſtate for the time future, it ſhould lay loſs upon him; which is

againſt reaſon, and contrary to the nature and diſpoſition in the law, even in this particular: as appears by this, that ſhe enables an executor to pay himſelf before any debt of equal nature; ſo as ſhe more tenders an executor's indempnity than any other creditor's. Therefore I think, that, with and upon the differences above ſhewed, even rent grown due after the teſtator's death may in ſome caſes be the teſtator's debt, payable equally with debts by bond. But here I conceive, that if the executor were in ſuch caſe of deſtitution of *Aſſets* as might juſtify his waiving of a leaſe over-rented, he then may waive the term's reſidue; becauſe for the future the profits will come ſhort of anſwering the rent, though at the firſt, and ſo in the total, the profits did exceed the rent. And if, for want of waiving where he might, this rent fall upon him, the payment thereof would be no excuſe againſt another creditor, nor as to him be a good adminiſtration; for *Ignorantia Juris non excuſat*, This is pertinent to our preſent conſideration, which debt may with ſafety be paid, leaving another unpaid: and the hazard of executors by ignorance of the law hath been a principal motive to my writing theſe diſcourſes in *Engliſh*. Hitherto we have only conſidered, as I think, of rents as they be recoverable by action of debt. Now let us ſee if there may not be ſomewhat different conſiderations touching diſtraining for rent, and ſo coming to recover it by avowry. Put we then the caſe, that an executor hath fully adminiſtred in payment of debts by bond, and after the leſſor or reverſioner cometh, and diſtraineth for arrearages of rent due in the teſtator's life; can the executor in bar of the avowry plead fully adminiſtred, as he might have done if

Where executor ought to wave the term.

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an action of debt had been brought for theſe arrearages; Doubtleſs, I think no; nothing ſhall hinder the levying of the rent upon the land, as long as it is enjoyed under the title of the leaſe, except the land come to the king, upon whoſe poſſeſſion no diſtreſs can be taken. I think therefore that the executor, who payed out of his own purſe to the value of this leaſe, (for ſo I intend the caſe, and elſe could he not have fully adminiſtred, as in the caſe was put) ſhould have abated in the price and valuation of the leaſe as well the arrearages of rent, as the rent futurely payable, both being equally leviable upon the land; and if he ſo have done, he is no loſer by payment of this arrearage: but if, truſting to the power of an executor and to the plea of fully adminiſtred, he did not ſo, but diſburſed in reſpect of the leaſe, to the full value without ſuch abatement, he muſt bear the loſs of his own ignorance. He might alſo another way have helped himſelf, *viz.* by payment of that arrearage, leaving other debts by ſpecialty unpaid. And what if ſuits were preſently commenced upon the teſtator's death, before he could make payment of the rent behind? whether might the executor then plead this debt for rent, as he might a debt by judgment or ſtatute? Surely methinks it's probable that he might, becauſe it is a debt from which he cannot be freed by payment of the other debt ſued for by ſpecialty. If the reverſioner would alſo commence ſuit before judgment had for the creditor by ſpecialty, then might the executor help himſelf by confeſſing his action firſt: but this perhaps the reverſioner would not conceive ſafe for him, ſince that way the others might get judgment before him, and ſo he might loſe both

Where executor may plead rent in arrear.

both his ſuit and his debt; whereas holding himſelf to the courſe of diſtreſs, the leaſe continuing, he hath land at the ſtake for his debt. What if he diſtrain and avow? may not now the executor pay him, or at leaſt confeſs his action or avowry, ſo as he firſt having judgment may firſt be ſatisfied? ſurely after ſuit commenced I ſee not how the creditors by bond can ſo be prevented, at leaſt without a judgment had for the rent, yea though ſuch a judgment be had; yet becauſe the judgment in that caſe is not, that he ſhall recover the ſum due for rent, but only that he ſhall have a return to the pound of the cattle diſtrained for the rent, it is queſtionable whether the payment thereupon of the rent ſhall prevent the judgments after had in the ſuits upon bonds. But I think it ſhall; becauſe although it be not an expreſs recovery of the rent, yet it is ſuch a judgment compulſory for the ſame as makes the payment inevitable and of neceſſity. And where before we have made the queſtion only between the ſaid rent-debt and the debt by obligation; let us now put the caſe between the rent-debt and the debt by ſtatute or judgment. If then the leſſor after death of the leſſee, diſtrain for the rent behind part of the teſtator's cattle, and after there comes a writ of execution upon a judgment or ſtatute of the teſtator's; whether ſhall theſe beaſts in the pound for rent be delivered in execution or not, admitting that without them there be not goods ſufficient for ſatisfaction of the judgment or ſtatute? And ſurely I think they cannot be delivered in execution. Firſt, for that they are in the cuſtody of the law, as in *Stringfellow*'s caſe, though there the King's prerogative overtopped that point. Yea

See 13 R. 2. Bro. Pledges, 31. attainder of the party d ſtrained ſhall not take away the diſtreſs, Vi. Dyer.

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ſo I think, though they be replevied, for that they are to be returned to the pound, if judgment paſs for the avowant, to which purpoſe ſecurity is given; ſo as they are but in the caſe of a priſoner bailed, who ſtill is in ſome ſort in cuſtody. Secondly, for that this rent incident to and deſcendible with the reverſion breeds a debt of a real nature, and ſo of more dignity and worth than debts perſonal. Thirdly, for that the land let (as in a ſort debtor) ſtands chargeable with this diſtreſs from the very time of making the leaſe, as either by contract real of *quid pro quo*, or rather by an operation of law or legal conſtitution, or ancient cuſtom of the realm, without any contract of perſons. Laſtly, for that the leſſor doth not diſtrain the cattle therefore, or in that reſpect, for that they are or were the goods of the teſtator, but for that he found them levant and couchant upon the land which muſt afford his rent, or a diſtreſs for it if behind: ſo as if they had been any undertenant's or ſtranger's cattle, they might have been diſtrained. Some may perhaps object this reaſon why theſe impounded cattle ſhould be delivered in execution, *viz.* for that where otherwiſe the creditor by ſtatute or judgment ſhould loſe all or part of his debt, yet by this relief done to him ſhall not the leſſor loſe his rent, for that he may at any time after diſtrain any goods or cattle found upon the ground at any time during the continuance of the leaſe. But here, beſides the point of delay and ſtay for this rent, which to many is the ſole means of maintaining their houſholds and families, this farther is conſiderable, that perhaps the leaſe may be near expiring, perhaps ſo highly racked and rented even to or above the value, as

that

that the executor having his teſtator's ſtock taken from it and him by execution, will not ſtock it any more; and ſo the land lying freſh, if the leſſor ſhall loſe the benefit of his former diſtreſs, he ſhall be perhaps without remedy for his arrearages of rent. And if the caſe were of a diſtreſs for rent behind after the teſtator's death, I conceive, though not ſo ſtrongly, for moſt of the reaſons above ſaid, that the law would be all one as in the other caſe: for though in this caſe reſpect ſhall not be had to the executor's loſs, upon whoſe goods the law caſts this debt though not the other; yet here the point of loſs muſt fall either upon the leſſor loſing his diſtreſs, or upon the other creditor by ſpecialty or record loſing wholly or in part his debt. And in reſpect of this local tie upon this land for payment of the rent, whereto even the fealty of the leſſee and tenure of the land bindeth him, I think no act that the leſſee can do by entering into bonds or ſtatutes, or having judgment againſt him, can hinder the leſſor or reverſioner from taking his remedy upon this leaſed land for the rent therefore due; but rather any other creditor ſhall be a loſer in his debt. Doubtleſs, if in bar to the avowry for this rent due either before or ſince the teſtator's death the executor will plead, that the teſtator was indebted 1000*l.* by ſtatute, recognizance, or judgment, which is more than all his goods amounted unto; it will be no good plea, but may be demurred upon, What if he plead ſo much debts of record to the crown? Surely I doubt whether this plea will be allowed in any other court than in the *Exchequer*: yet if theſe arrearages of rent ſhall be levied upon the land,

Vide Bro. Pledg. 31.

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ſo as either the executor muſt pay it, or loſe the cattle diſtrained by a return irrepleviſable, and then ſhall not have ſufficient to ſatisfy the debt to the crown; I ſee not how he ſhall well eſcape, when perſued in the *Exchequer* to make up this crown-debt out of his own purſe, which is hard For this we may pitch upon as a maxim and principle, that an executor, where no default is in him, ſhall not be bound to pay more for his teſtator than his goods amount unto. Again, it is a rule, that where nothing is to be had, *viz.* juſtly to be had, the king loſeth his right: and our books tell us, the king's prerogative muſt not do wrong. *Poteſtas ejus juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed Diaboli.* On the other ſide, it may be ſaid, that if land leaſed come to the King by grant, outlawry, or otherwiſe, the rent reſerved cannot be diſtrained for; and therefore it is not very unreaſonable nor incongruent that the King's intereſt for his debt ſhould make the diſtreſs of a ſubject ſtand by and give place. This therefore among other of the premiſſes do I leave as a *Quære:* nor is it altogether unprofitable either for an executor or creditor to know what ways and paſſages, what caſes and contingents be doubtful and hazardous. And if in theſe unbeaten paths, where our books and relations have held me forth no light expreſs or particular, I have erred in miſreſolving, or miſſing to reſolve; I hope I ſhall without difficulty obtain pardon.

Maxim.

So Bracton.

Now let us conſider of aſſumptions or promiſes made by the teſtator upon good conſideration; the performance whereof, or making recompence and ſatisfaction for not performing, doth lie upon an executor, as before is ſhewed.

Theſe

Theſe therefore are to come behind, and give place unto all the former; ſo as an executor this way or for theſe ſued may plead debts by ſpecialty, rent, *&c.* amounting to the whole goods. And yet theſe debts by contract or aſſumption expreſs are to be ſatisfied before legacies be to be had. Firſt, becauſe by the common law of the land thoſe are recoverable, and ſo are not legacies. Next, becauſe, as our books ſpeak, it concerns the ſoul of the teſtator to have *æs alienum*, all duties and debts to other men ſatisfied before the debtor's voluntary gifts or bequeſts. Alſo theſe debts by aſſumption or ſimple contract are to be ſatisfied before the reaſonable part of the wife or children, to which by cuſtom in ſome counties they are intitled. See 22 *Ed.* 4. 21. and 2 *Ed.* 4. 13. and 2 *Hen.* 6. 16. And note that in ſuch an action upon the caſe, it is not of neceſſity to lay or ſet forth in the declaration that the defendant hath aſſets to pay all debts by ſpecialty, and this alſo; but if there want, the defendant muſt alledge that in his excuſe, for elſe it ſhall be preſumed that he hath *Aſſets*. So alſo in an action upon a caſe grounded upon the executor's own aſſumption to pay his teſtator's debt: and yet, as the L. *Coke* conceives, and upon good reaſon, as to me it ſeems, if the executor ſo promiſing had not *Aſſets* ſufficient in his hands to pay this debt promiſed, he pleading *Non Aſſumpſit* may give that in evidence; for then the conſideration faileth: as alſo if there were no ſuch debt due, ſince the plaintiff could not have recovered if he had ſued; and ſo his forbearance to ſue was no valuable conſideration.

Co. lib. 9. f. 88. b. Doct. & Stud. lib. 2, cap. 10 & 11.

Co. l. 9. fo. 90. Pinchon's caſe, and fol. 94. Dane's caſe,

Vide Cro. Jac. 613. Booth v. Crampton, Paſ. 19 Jac. where in an action againſt executor on his own promiſe after verdict motion in arreſt of judgment that declaration doth not aver aſſets at time of promiſe but not allowed, and judgment for plaintiff.

CHAP.

CHAP. XIII.

Of devaſtation or waſting.

THAT which St. *Paul* of diſpenſers ſpiritual (who are as it were the executors of the laſt will and teſtament of our Saviour *Chriſt*) doth ſay or enjoin, *viz.* that they muſt be *found faithful*; the ſame is required of theſe leſs or inferior diſpenſers, the executors of men's wills: and hereof they are to be regardful, not only in reſpect of eſcaping damage to their own eſtates, but more eſpecially in reſpect of an oath which divers of our books mention to be taken by executors. And in one of the books of relations of caſes in the twentieth year of *H.* 7. his time, there is an expreſſion of three things whereto the office of an executor tieth him. 1. To do truly, and thereto are they ſworn, ſaith this book. 2. To be diligent, *viz.* with ſedulity to attend the diſcharge of the truſt. 3. To do lawfully; nor well can this later be without knowledge what is lawful or required by the law. Now what is formerly ſaid of the right method and order of payment of debts, diſcovereth in much part how and by what ways an executor may waſte and miſ-ſpend his teſtator's goods, and conſequently incur a devaſtation, and ſo make his own goods liable. But of that more fully and particularly by itſelf. And herein we will conſider of theſe parts.

1. What ſhall be ſaid to be a waſting or devaſting, and how many ways that may be done.

2. Who ſhall by this act be charged to yield recompence.

3. Who

3. Who ſhall take the benefit or advantage of it.

4. How far or in what meaſure the advantage ſhall be taken.

5. What way or by what means it ſhall be had.

As to the firſt, this waſting is done divers ways. 1. By the executor his plain, palpable and direct giving, ſelling, ſpending or conſuming the teſtator's goods after his own will, leaving debts unpaid. 2. By paying what is not to be paid; which yet is to be underſtood where there are debts payable, and unpaid. 3. By the way formerly diſcourſed of, *viz.* the not obſerving the right method and order of payment. 4. By aſſenting to a legatee's having a thing bequeathed, debts being unpaid. 5. By ſelling goods of the teſtator's at an under value, for (be the appraiſment what it will and let him ſell for what he will) he muſt ſtand charged to the beſt and utmoſt value towards the creditors. Yet if, upon a judgment againſt the teſtator or the executor, the ſheriff ſell ſome of the teſtator's goods at an under value, this is no waſtation of the executor, for this difference *Hody* chief Baron makes. But ſince an executor may haply prevent this act of the ſheriff, by paying the due ſum upon ſale of the teſtator's goods at the beſt value or otherwiſe, he is to be blamed to leave it to the conſcience of the ſheriff or under ſheriff rather. 6. And laſtly, this may be done to the executor's ſmart by undue, *viz.* not legal diſcharging of any debt or duty pertaining to the teſtator, and that divers ways requiring heedfulneſs. As if an executor upon a bond of two hundred pounds forfeited for payment of 100*l.*

accept

accept the principal, or perhaps alſo ſome uſe, coſts, or damage, and give a releaſe or acquittal of the whole forfeited bond, or of all actions, or upon record acknowledge ſatisfaction upon judgment had; this is a waſting of ſo much as the penal ſum is more than is received, and ſo far his own goods ſtand liable to creditors not ſatisfied: and ſo doubtleſs is it, if he do but give up the bond, having no judgment upon it, though he neither make releaſe, nor acknowledge ſatisfaction. But his verbal agreement to require or ſue for no more, or his giving a note of receipt for ſo much as he hath received, or delivering of the bond into a friend's hands or into a court of equity in way of ſecurity to the debtor, that he ſhall not be ſued for more, is no devaſtation, ſince ſtill the reſt in law remains due and ſuable. So this ſets no more upon the executor's ſcore than he received. But let him take heed of releaſing, except he be ſure there be no other debts demandable. Nor only is there danger in releaſing of debts, but of treſpaſs or other cauſes of action alſo. As if one take away goods from the teſtator, or from his executor; if the executor make him a releaſe, this is a devaſtation, and makes his own goods liable to the whole value of the goods releaſed: as appears by *Ruſſel*'s caſe where the releaſe of an infant executor, to one who had taken and committed to his uſe jewels and goods of the teſtator, being pleaded, the releaſe was therefore held void in reſpect of nonage; for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made the executor's own goods liable; which, his infancy conſidered, had been hard. Another way of diſcharging, dangerous

13 E. 3. Fitz. 91. Yet on the other ſide, if an executor by payment of 110 l. get in a forfeited bond of 200 l. it ſhall be an adminiſt. but of 110 l. 27 H. 8. 6. P. Fitz. Inſt.

Lib. 5. 27.

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to executors is, ſubmitting matters of debt or duty, or touching goods taken away, to arbitrement. For if by the award of the arbitrators the debtors or wrong-doers be diſcharged or acquitted without making full recompence, the reſt of the value will (as to other creditors) ſit upon the executors ſkirts, becauſe it was their voluntary act thus to ſubmit it to arbitrators. Thus may executors fall under prejudice, not only by wilful waſting or unfaithful miſcarriage, (wherein they are not to be pitied) but through incogitancy and unſkilfulneſs alſo. Nay, I may ſay truly, that it is very hard for executors in ſome caſes to walk ſafely: for beſides that, to find out all judgments and recognizances by or againſt their teſtators is of ſome difficulty more than for ſtatutes, whereof by ſearch in an office diſcovery may be had; yet with this difference, that ſtatutes-merchant and ſtatutes-ſtaple may be and ſtand effectual againſt executors, though not inrolled; albeit againſt purchaſers of the conuſor's land they be not of force, if neglect be of inrolment within three months. But where ſtatutes or recognizances lie for performance of covenants upon ſale or leaſe of lands, marriage agreements, or otherwiſe; how hard is it for executors to know whether any covenant be broken or not? How hard to be ſure they find out all bonds, bills, covenants and articles in writing, made and kept by others, whereby any money is due and payable before debts by contract or legacies, as alſo all promiſes or debts by contract payable before legacies? For the law hath preſcribed no time for their claim and demand: and whether ſome ſuch thing or mean of publication were not fit

This diſcovery is difficult, for even a judgment in a court of piepowders is binding.

to

to be enacted, let the judicious conſider. To attain to this knowledge of the teſtator's debts, I remember that it is by the lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being executor to Sir *William Spencer*, made proclamation in certain market-towns, that the creditors ſhould come by a certain day, and claim and prove their debts; but he for this was committed to the *Fleet*, and fined. For that none may make proclamation, ſaith the book, without warrant or authority from the king, except mayors and ſuch like governors of towns, who by privilege or cuſtom may ſo do. But the dangers are only where there is not ſufficient of the teſtator's goods and chattels to ſatisfy both debts and legacies. For where there is ſo, the executor is not in any ſuch hazard as aforeſaid. This deſcry of danger may breed caution; and *Qui timent & cavent vitant.*

As to the ſecond, we ſhall have in conſideration two ſorts of perſons, *videlicet*, 1. his executors, there being many times divers executors, and the waſte or devaſtation done but by one; 2. the executor's own heirs, executors and adminiſtrator, *viz.* whether, he dying, this act ſhall fix upon them like charge and burthen for ſatisfaction, as upon himſelf ſhould have lien in caſe he had lived.

Touching his companions though all together make but one executor, yet the miſ-doing of one ſhall not charge the reſt, nor make their goods liable to recompence: as both appears by the book of *Entries*, and was alſo held in the time of *Henry* the ſeventh, *Anno* 12. of his reign. Yea of the opinion were the judges twice in the late Queen's time, *viz.* firſt a caſe

Lib. Intrat fol. 327. Kelw. R. p. fol. 23 So 11 H. 6 38. a. 4 E. D. 2 10 a. the Writ ſo iſſued gainſt the waſter only. P. 4 H. 8. Rot. 303. Tr. 34. El. Pal. 36 Eliz.

caſe between *Walter* and *Sutton*, in the *Common Pleas*, and ſhortly after in the *King's Bench*, in a caſe between *Hankeford* and *Metford*; tho' theſe two caſes be not reported in print. And ſurely this ſtands with rules of reaſon or juſtice, that each ſhould bear his own burthen. If it were otherwiſe, many would decline and abandon executorſhips, as very dangerous to the moſt honeſt and faithful, in caſe they were ſubject to racking by the miſcarriage of their collegues.

The executor of an executor liable in equity for any waſte or wrong done by his teſtator tho' not at law, being conſidered as a perſonal tort. 2 Chan. Ca. 217. 2 Mod. 293. Chan. Ca. 303. Mich. 31 & 32 Eliz. Tr. 34 El.

As for the executors or adminiſtrators of the waſting executor dying before he have born the burthen of his miſ-doing, I have found contrary opinions, even in the late Queen's time, For firſt, in the *Exchequer* it was conceived to be as a treſpaſs dying with the perſon, as coming within the rule, *Actio perſonalis moritur cum perſona*. But in the ſaid caſe of *Walter* and *Sutton* the court of *Common Pleas* was of contrary opinion, *viz.* that this was not eſcaped by the death of this miſ-doer; but the law would purſue his executors or adminiſtrators, and lay upon their backs the burthen of recompence or ſatisfaction; for that the teſtator or inteſtate, during this wrong had made himſelf to be debtor in the firſt teſtator's ſtead, and therefore they who repreſent his perſon muſt with his goods make amends and ſupply. And this later opinion was ſomething in time after the former. Alſo between theſe two times was there an opinion in the ſaid court of *Common Pleas* agreeing in part with this later: for there a judgment being had againſt an executor, and the ſheriff upon the *Fieri facias* returning that there were no goods of the teſtators in the executor's hands, and then this

Tr. 34. Eliz. Mich. 32 & 33 Eliz.

this executor dying, a *Scire facias* upon a ſuggeſtion of devaſtation by the ſaid executor deceaſed was awarded againſt his executor, and that upon good debate, and ſhew of a precedent left, and reported by M. *Jennour* in King *Hen.* 8. his time. And it was then ſaid to have been clear, that if a devaſtation had been returned in the life-time of the ſaid waſtful executor, his executor then ſhould have been charged. All the doubt was, for that here that was not done in his life-time, yet at laſt affirmatively (as above is ſhewed) the reſolution was.

Touching the third point, *viz.* To whom the advantage of waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting executor: put we the caſe the teſtator ſtood indebted to *A.* by ſtatute, and to *B. C.* and *D.* by ſpecialty not of record, as bond, bill, *&c.* and the executor having no more in *Aſſets* than only an hundred pounds, and this all being due to *D.* he payeth him the whole hundred pounds, not having any thing left to ſatisfy any of the reſt of the creditors: hereby wrong is done to none but *A.* who was a creditor by ſtatute, and therefore he only ſhall make this executor to pay the like ſum out of his own goods, ſince as to him only this is a devaſtation, for that it was at his election to pay off the other creditors, which he would, no ſuit being commenced by any of them, conſequently no wrong was done to *B.* nor *C.* And if no ſuch debt had been by ſtatute, but all had been creditors, by ſpecialty, and *A.* only had commenced ſuit, and that known to the executor; now if after he paid all

If upon fully adminiſtred pleaded to one, vel aliter, he have the advantage of this vaſtation, taking up the whole ſum waſted, Quæ. how the executor ſhall relieve himſelf againſt another.

to *D.* he ſtands only as to *A.* liable in his own goods, and not to *B.* nor *C.* But if the executor had only paid a legacy or debt by contract, leaving nothing for ſatisfaction of the debts by ſpecialty, then had he ſtood equally liable to each of the other creditors. *Capiat qui capere poteſt*, viz. He who firſt could recover, or by the voluntary act of the executor could obtain payment, muſt be preferred, if the ſum would reach no farther. For it ſhall by this miſpayment, or miſconverſion, ſtand with the executor as if he had not paid it nor departed from it at all upon the matter: and therefore I doubt not but it is free for him to give the advantage of this his error to which creditor by ſpecialty he will, ſo as he ſhall ſtand free from all the reſt, no ſurpluſage remaining, nor any creditor of record being. For if there be any debt upon record, the executor ſued by a creditor upon bond may, notwithſtanding this his waſting, plead in bar of this ſuit, that there is ſuch a record of a debt not ſatisfied, and that he hath no more than that debt amounts unto, and ſo admit ſo much ſtill in his hands as he hath miſ-adminiſtred, though in kind it be not in his hand, but miſſpent, or unduly paid, as aforeſaid. And what is before ſhewed of the ſtatutes precedency before bonds, in taking the advantage againſt an executor for devaſting or waſting, the ſame is to be underſtood of precedency of judgments before ſtatutes, and debts to the King before judgments, *&c.*

As touching the fourth point, *viz.* How far the executor thus waſting ſhall incur damage or make his own goods liable; doubtleſs, no farther than the value of teſtator's goods waſted or miſ-adminiſtred. Therefore if one have advantage

tage thereof to the full ſum, no other after ſhall, for he is no farther a treſpaſſer or wrong-doer nor is the teſtator's eſtate any farther or deeplier damnified. And as damages for treſpaſs are to be proportioned to the value of the wrong done and loſs ſuſtained; ſo alſo in this caſe the executor by his miſdoing doth not draw upon himſelf his teſtator's whole debts, but ſo much only as the goods amounted to which he did miſ-adminiſter, and which ſhould have gone to the payment of the teſtator's debt, if he had not ſo miſguided himſelf in the office of executorſhip; which default he muſt repair or make good. And this proportion ſeems to me proved by the caſe in K. *Edw.* 3. where the value or quantity is found, eſpecially of the goods adminiſtred wrongfully, though there by a wrongful perſon: and in *Sutton*'s caſe it was expreſly held, that each executor ſhould anſwer for ſo much as he waſted. 41 E. 3. 31.

Now for the fifth and laſt point, *viz.* How and in what manner relief ſhall be had upon this point of waſting, for him to whom it pertains: Firſt, this is to be obſerved, that in caſe where the verdict paſſeth directly againſt the plaintiff, no devaſtation can come in queſtion, for that no judgment being for the plaintiff, no writ of execution can iſſue; and therefore, if upon the iſſue of fully adminiſtred, it ſhall appear that there hath been a devaſtation, which cauſeth *Aſſets* to fail, then muſt the jury find that the defendant hath *Aſſets*, and not find a devaſtation, as was reſolved in the *King's Bench* in the late Queen's time between *Hankeford* and *Metford:* for there the jury finding a devaſtation, *viz.* a ſurrender of a leaſe for years left by Paſ. 36 El in 6. the Reg.

the teſtator, it was held void and nugatory, and was not regarded by the court, which ſaid that muſt come in by the ſheriffs return, *viz.* upon the *Fieri facias.* Thus *Aſſets* being found in the executor's hands judgment is given for the plaintiff to recover his debt, and to have it levied of theſe *Aſſets:* nor is this finding of them by a jury againſt truth, though they be waſted, and ſo not to be had in kind; for the executor had them in right, ſince he hath not rightfully parted from them; according to the rule, *Pro poſſeſſore habetur qui dolo* (or *injuria*) *deſiit poſſidere.* As in the caſe firſt put, this waſting cannot come in queſtion for want of a judgment for the plaintiff; ſo alſo where the judgment it ſelf extendeth to the executor's own goods by reaſon of ſome falſe plea, whereof we ſhall after conſider: for ſince that the conſequence and effect of a vaſtation is but to make the excutor's own proper goods liable to the debt of the creditor, this is altogether needleſs where the judgment it ſelf hath laid hold of his goods. But now in caſe where the judgment extends only to the teſtator's goods in the executor's hands, let us find the way to relieve the creditor, in caſe the teſtator's goods be waſted by miſadminiſtring or otherwiſe; for hereabout the right way hath often been miſſed, and again eaſily may be. In the later end of the late Queen's time, this courſe was taken, *viz.* The ſheriff returning generally, that the executor had no goods, a ſurmiſe was entered, that the executor had converted to his own uſe the teſtator's goods, whereupon a writ was awarded to the ſheriff to enquire thereof by jury or inqueſt, which he did, and returned, that it was found

43 El. Pettifer's caſe Co. l. 5. f. 32.

found that the executor had waſted the goods; and thereupon a *Scire facias* was awarded againſt the executor, to ſhew cauſe why execution ſhould not be of his own goods; and upon two *Nihils* returned, execution was ſo awarded: but a writ of error was hereupon brought. And although it were ſaid, for defence of that courſe, that it was uſual in the *Common Pleas*, and more favourable than the other courſe, where the ſheriff only returneth the waſting, or is ſole judge thereof, whereas here it was found by an inqueſt of jurors, and thereupon a *Scire facias* awarded; yet did the court reſolve the contrary, and reverſe this execution as erroneous: for it was ſaid, that upon the ſheriffs return of *Nulla Bona*, *viz.* that there were no goods of the teſtator to be found, the plaintiff ſhould have a ſpecial writ of *Fi. fac.* willing the ſheriff to levy the ſum recovered either of the goods of the teſtator or if it could appear that the executor had waſted the teſtator's, then to levy it of his own goods. And this way, as was ſaid, the executor hath good remedy by action againſt the ſheriff if without juſt cauſe he levy it of his goods; but the other way, *viz.* when inqueſt is thereupon taken, the remedy fails, ſince neither the ſheriff doing according to the inqueſt can be puniſhed, nor the jurors finding falſly are ſubject to any attaint, it being no verdict upon iſſue joined, but an inqueſt of office, which excludeth alſo all challenge of jurors. And whereas that book mentions the ſheriff's ſubjection to action only in caſe of his miſ-feaſance or doing wrong; I conceive that he is likewiſe ſuable for omiſſion or non-feaſance in this caſe, *viz.* for not levying the debt upon the executor's

So 9 H. 6. f. 9. See Paſton, 11 H. 8 16. 36. upon ſurmiſe that A. hath waſted, a Fieri facias may iſſue againſt his goods only, if ſo, &c. So lib. Intr. fol. 11.

own goods, where proof is made of his waſteing. And where the book mentions this *Fieri facias* to be in this manner upon the ſheriffs return in a *Scire facias*, doubtleſs the book therein is miſprinted, and ſhould be a *Fieri facias*; for in a *Scire facias* the ſheriff can return nothing but that he warned the party, or that he hath nothing whereby he may be warned. This then is the courſe there preſcribed, that firſt a general *Fieri facias* go out, and that thereupon the ſheriff return generally, that the defendant hath no goods of the teſtator's, and that thereupon the ſaid ſpecial writ is to iſſue. Yet in the beginning of the late Queen's time, the verdict paſſing for the plaintiff upon the iſſue of fully adminiſtred, the ſheriff was not permitted to make ſuch a general return of no goods to be found of the teſtator's, but was enforced by the court upon good adviſement either to levy the debt, or to return a *Devaſtavit*: and ſo it was done at laſt by the ſheriffs of *London*, much againſt their minds, and thereupon went out a writ to levy the debt of the executor's own goods, firſt in *London*, and after in *Devonſhire*, upon a *Teſtatum* that the executor had goods there. And it was there ſaid, that if no goods could be there found, then the plaintiff might have a *Capias* to take the executor's body in execution, or an *Elegit* for the moiety of his lands. But certainly I cannot find (except with a difference) how this courſe of enforcing the ſheriff to do one of theſe two can be juſt; as neither could juſtice *Fulthorp* in the time of

2 El. D. 185. Woodw. and Chicheſter's caſe.

11 H. 6. f. 18. 28 H. 8. Dy. 3. Yea Co. li 6. f. 47. 48. Aſſets in Ireland or elſewhere beyond the ſea, may be found by the jury where the action is laid, For the Pl. may if he will ſuggeſt the being of Aſſets in a foreign country, and this is uſually done. See Lib. Intr 11. action upon the caſe for a falſe return of devaſtavit. contra facr. ſui deb.tum, 28 H 8.

King

King *Hen.* the ſixth approve it. For a jury of one county, may find *Aſſets* in another county, as was reſolved in the time of King *Henry* the eighth, which, yet was underſtood of goods moveable, not of lands. This then thus being, if a jury of *Kent* find *Aſſets* which be in *London* or *Eſſex*, how can the ſheriff of *Kent*, where the action was laid, levy the debt recovered by or out of theſe goods? or, ſince he cannot, why ſhould he be compelled to make a falſe return of a waſting, when the goods remain unſpent and unwaſted in another county? Why rather ſhould he not be ſuffered to return according to truth, that there is nothing within his county or bailiwick whereof the debt may be levied, ſince even his oath tieth him to make a true return? Nor is this contrary to the verdict, finding *Aſſets* generally; and this ſo returned upon a *Teſtatum*, the proceſs may be directed into the right county. But in the ſaid caſe it was replied to the plea of fully adminiſtred, that there were *Aſſets* in *Eſſex*, the action being laid in *Middleſex*, and yet, as it ſeems by the book, the trial was to be by a jury of *Middleſex*, which ſaith the book, may find the *Aſſets* in *Eſſex*: but there the plea was demurred upon, and held a good plea; which proves, that although the tranſitorineſs of the *Aſſets* make them ſubject to the notice of a foreign jury, yet is it not like an act tranſitory, and not local, for that muſt be pleaded to be done in the place where the action is laid, though in truth not ſo. But had iſſue been joined upon the point, methinks it ſhould be tried in *Eſſex* where the *Aſſets* be laid;

2 Ma. Bro. attaint 104 & 10 El. Dyer 271. Becauſe local & fixed, otherwiſe held 3 Jac. in

Com. Ban. Co. lib. 6. f. 46, 47. 22 E. 49. & 2 Ma. Bro. attaint 104. 18 H. 7. Kelw. Rep. 51. a. So held P. 31 E. in Scaccar.

laid; the rather for that perhaps they may be real chattels, *viz.* lands leaſed to the teſtator, or other lands of him appointed to be ſold for payment of debts, which, as heretofore hath been held, a jury of another county cannot find. Beſides, although ſuch a foreign jury may find other moveable *Aſſets*, yet is it at their election, they are not thereto compellable, as elſewhere is holden. Here then may be the difference, *viz.* That if the *Aſſets* be found to be in the county where the trial is, there the ſheriff of that county cannot return *Nulla Bona*, without adding that the executor had waſted: but if there be no verdict at all touching *Aſſets*, judgment paſſing againſt the executor upon a demurrer confeſſion, *Nihil dicit*, or the like; there may the ſheriff make ſuch a return of *Nulla bona Teſtatoris*, without returning any devaſtation: and ſo alſo where the verdict either findeth *Aſſets* generally, not finding in what place they be; or expreſly findeth them to be in another county, as a little before we found may be done by a jury of *London* of *Aſſets* in *Eſſex*.

So if the proceſs for execution go into another county than where the verdict found as the difference was held in Scac. 31 El. 28. H. 8. Dy. 30. b. Paſ. 4 H. 8. Rot. 30. 4 El. Dyer. 210.

In King *Henry* the eighth his time, as a little after the caſe of *Chicheſter* is by the Ld. *Dyer* reported, the ſheriff returning upon the *Fieri facias*, that the executors had no goods of the teſtator's did add in the ſame return, that one of the two executors had waſted, and thereupon a *Sci. fac.* was awarded againſt him; and upon *Sci. feci.* returned, and default made, execution was adjudged, and awarded againſt his goods only. And this courſe of *Sci. fac.* both the L. *Dy.* (as elſewhere I find it reported) and *Priſot*, *temp. H.* 6. approved. But I am perplexed with doubt what plea the executor coming in upon

But 3 H. 6. 12. without any Sci. fa. upon the devaſt. returned, a Cap. was awarded by the court; and ſee 9 H 57. Bro. Ex. 57, & Lib. intr. 320. A. Fi. fac. abſolutely and without condition. So 9 H. 6. 43, 50. A manuſcript report. 36 H. 6. 3. and Mordant, 12 H. 7. Kel. Rep. 24. But Vavaſor juſt. and all the other ſerjeants è contra, 2 El. D. 185.

upon the *Scire facias* could plead; for except his denial of waſting might be pleaded contrary to the ſheriff's return, and put in iſſue, ſo as to cauſe a new Trial after a former, perhaps preceding judgment, which I think would not be admitted, then his coming in, is to little purpoſe, for ought I can conceive. Here again it muſt be obſerved, that in the caſe of *Chicheſter*, the judgment was had upon trial of fully adminiſtred: but in the other caſe in the time of King *Henry* the eighth it was upon confeſſion; which is all one, as I take it, with condemnation upon demurrer, or *Non ſum informatus*, or trial upon *Non eſt factum* to the bond, or a releaſe to the teſtator, or the like. Now between all theſe and that of *Chicheſter* there is a broad difference: for there the defendant being convinced by verdict to have *Aſſets*, which if they continue not in his hands in kind, muſt be anſwered out of his own goods as waſted, therefore the *Fieri fac.* to levy the debt of the teſtator's goods if any found, or in default thereof out of his own goods, is very agreeable and purſuant; but in none of the other caſes is there any ſuch trial or conviction of the defendant's having *Aſſets*, ſo as it reſts *æque dubium* whether they have *Aſſets* or not: and therefore it may ſeem ſomewhat hard and harſh to ſend out ſuch a writ in that caſe; and ſo ſhould I have thought if I had only ſeen the report of *Pettifer*'s caſe. But looking into the record, and finding the condemnation there to be by *Nihil dicit* in effect, I cannot uphold any diſtinction of courſe in reſpect of the ſaid difference of caſes. Nor indeed doth that courſe directed preſume that the executor either hath *Aſſets*, or hath waſted them, but

Co. l. 5. f. 31. Mich. 41 El. Rot. 2.4. Co. li. intr. 266. b. A recovery of debt precedent was pleaded: Pl. replied Nul tiel record, and defend. would not maintain his plea. Ideo condemp. If neither, he muſt ſo return, and do nothing.

but commands that if *Aſſets*, &c. then the levying ſhall be one way; if waſting, then another way: ſo if neither, *Nihil fiendum.*

Where the huſband ſurviving the wife, may be charged in equity upon a *Devaſtavit*, Vide 1 *Lutw.* 670. upon equity of the ſtat. 30 *Car.* 2. See *Salk. Rep.* 310.

CHAP. XIV.

Of an executor of his own wrong.

TO begin with ſome definition or deſcription of this man; he is ſuch as takes upon him the office of an executor by intruſion, not being ſo conſtituted by the teſtator or deceaſed, nor for want of ſuch conſtitution ſubſtituted by the ordinary to adminiſter. Touching whom we will conſider in theſe parts, and with this method, *viz.*

1. What acts or intermedlings of ſuch a one, not being executor nor adminiſtrator by right, ſhall make him become an executor by wrong. *Vide* five more, *per Stat.* 43 *El. cap.* 8.

2. In what manner and by what name ſuch ſhall be ſued, eſpecially when another than he is executor or adminiſtrator, or himſelf after ſuch act becomes adminiſtrator.

3. How far he becomes liable to the creditors, and how and to whom.

4. What acts done by him ſhall ſtand firm as if he had been an executor by right.

5. See a late ſtat. 43 *El. cap.* 8. hereabout.

1 Point 1 & 2 P. & M. Dy. 103. b.

As to the firſt, it was in the time of Queen *Mary* doubted, and not reſolved, whether the only

only ſeiſing and taking into one's hands the goods of the deceaſed did make one executor of his own wrong, without any farther act. And in the beginning of the late Queen's time the Ld. *Dyer* ſaid, that the poſſeſſion and occupation of, or medling with the goods is *that* which gives notice to creditors whom they are to ſue as executor. But doubtleſs creditors muſt look farther before ſuit; for elſe can they not know whether he ſo intermedling be executor or adminiſtrator; nor conſequently how to found their ſuit rightly and ſafely for good ſucceſs; ſince a ſuit againſt an executor as adminiſtrator, or againſt an adminiſtrator as executor, will prove ruinous, and fall to the ground. Yea where an adminiſtrator ſued as executor did not plead that adminiſtration was committed unto him, but generally denied that he was executor, or adminiſtred as executor; the Lord *Dyer* held that it muſt be found for him, yet left it doubtful; but the clear and ſafe way had been to have pleaded the adminiſtration, *&c.* and in the former caſe the Lord *Dyer* ſaid, that one intermedling only about the funeral and laying out money therefore, an overſeer or conducter, or he who hath letters of the ordinary *ad colligend. viz.* to get and keep the goods in ſafety, and he who intermedleth by virtue of a *will* truly made, but controlled by a later *will* after found and proved, may free himſelf from being an executor of his own wrong, by ſpecial pleading how or in what right he intermedled, and traverſing his adminiſtring in other manner: and that this traverſe need not, nay may not be, was held in the time of King *Hen.* 6. and 7. for that ſuch acts amount

1 El. Dy. 166. & 167. So alſo Belkn. 50Ed 3.9.

13 & 14 El. Dy. 305, 306 1 El. Dy. 166 & 167. See l. intr. 322.o

12 H. 6. 28. 10 H. 7. 28. Yet lib. intrat. 321. b. where he confeſſed about funeral, be traverſed aliter Lib. intrat 321. where by letter ad colig. he traverſed, Abſq ; hoc quod & Ex.
21 H. 6. 21.

amount not to any adminiſtring at all; and where no adminiſtring at all is confeſſed, ſuch a traverſe of not adminiſtring in other manner is diſſonant, and not legal But let us look back upon theſe ſeveral points exempted by the Lord *Dyer*, and we ſhall ſee ſome cautions neceſſary touching them and their ſafe entertainment. Firſt, as touching the point of burying the dead, it muſt be underſtood to be with ſome expence of the deceaſed's goods, and ſo it is expreſſed in the ſaid book of *Hen.* the 6th his time: elſe for a man out of charity to lay out of his own money (not intermedling with the goods of the deceaſed) to bury a friend, hath little colour to involve him ſo doing in an executorſhip by wrong. Taking the caſe then, that ſuch perſon lays out or expends, of the deceaſed's goods or money upon his funeral, heed muſt be taken touching the meaſure, and proportion whereabout. Though I can give no particular and diſtinct limit, yet doubtleſs either meer neceſſity, *viz.* church-duties, *&c.* or at leaſt decent ſuitableneſs to his quality muſt be the bounds. And herein to ſpeak as I think, this later muſt either be utterly excluded, or held within very narrow compaſs: for what reaſon that a knight or man of higher quality, leaving (though perhaps entailed lands of good value) yet goods not ſufficient to pay his debts, ſhould have an hundred pounds or more of that which ſhould ſatisfy creditors, ſpent in pompous interring of him for his worſhip and reputation? Next, overſeers may only be excuſed for ſeeking to preſerve and keep the teſtator's goods, not in caſe they expend or diſpoſe thereof. So alſo for him who is authorized by the ordinary

to collect, for if he ſell or diſpoſe of any (though goods otherwiſe ſubject to periſhing) it makes him an executor by wrong, as was reſolved in the late Queen's time, notwithſtanding that by the ordinary's letters he was expreſly directed or warranted ſo to do; for it was ſaid, the ordinary himſelf could not ſo do. As for him who adminiſtred by virtue of a *will* after diſproved, or controlled by a later, he muſt not doubtleſs ſtand free for the goods before adminiſtred, but either as rightful or wrongful executor ſtand liable to the creditors. Nor doth every ſuch intermedling by one out of all theſe excuſes and evaſions as would be an adminiſtration, make one an executor by wrong. If one do but take an horſe of the deceaſed, and tie him in his houſe or ſtable, this makes him not an executor, ſaith *Paſton*, juſtice, all like acts or intermedlings; as he that delivers to the wife of the deceaſed her apparel, at leaſt if it be no more than is convenient to her degree. But if ſhe take, or another deliver more than ſuch to her, ſhe or he becomes an executor by wrong. But now let us come to a difference, where there is a rightful executor, and a *will* by him proved, or adminiſtration committed; for there ſuch light acts or intermedlings ſhall not make one an executor by wrong, as where there is no other of right to be ſued. As if one take goods wrongfully from ſuch a right executor, this (though he convert them to his own uſe) makes him not an executor by wrong, but a treſpaſſer to the rightful executor or adminiſtrator, who even for theſe goods, once *Aſſets* in his hands, ſtands liable to ſuits of creditors, they being neither lawfully

Lib. intr. 322. 8 & 9 Eliz. Dyer 255. 256. He ſold blended corn, but pleaded not the ſpecial matter.

1 & 2 P. & M. Dy. 18 a. 21 H. 6. 28.

3 H. 6. 32. 1 El. Dy. 166. Tr. 37 El. by Fenner, juſt. if one do any ſuch act as pulls the property out of the executor, he is become an executor by wrong.

If the goods be aliened by fraud, he who takes them after the executor's death is an executor by wrong Tr. 37 Eliz. D. 5 E. 4. 72. a. Tr. 2 Ja. in Com. B. Co. lib. 5. 33. 34.

lawfully evicted nor rightly adminiſtred: but in caſe there had been no executor at that time, or no will proved, nor adminiſtration committed, then ſuch taking of the deceaſed's goods into a ſtrange hand had made an executorſhip by wrong. And thus was the difference lately reſolved, as is reported by the L. *Coke* in the caſe between *Read* and *Carter* in the *Common Pleas*.

Yet this farther difference was there held, *viz.* That although there be an executor or adminiſtrator by right, yet if a ſtranger take upon him to receive debts and make acquittances, or to pay debts, claiming to be an executor, he is ſuable as an executor by this act: and ſo alſo in the late Queen's time was held by ſix juſtices, as touching the receipt of debts and making acquittances; but the book mentions not whether any other executor then were, or not. But in the point of bare payment of debts, *Frowick* makes another difference, *viz.* If a ſtranger do with his own money pay the debts of a friend deceaſed, and not with the debtor's; this is but an act of charity, and makes him not an executor by wrong: otherwiſe, if with the debtor's money. Yet to this another difference muſt be added, *viz.* That if he thus paying with his own money, have taken into his own hands goods of the deceaſed; then is his payment preſumed as by or out of the value of theſe goods, and ſo makes him an executor by wrong. Contrarily, if he have no ſuch goods in his hands. And in the point of intermedling with and diſpoſing of the teſtator's goods, where another executor is, this farther difference is to be added or underſtood, *viz.* That where the goods

1 Eliz. D. 160. b.

7 H. 5. 20.

ſo

ſo taken never came actually to the executor's hands, but were in a remote place, there this taker becomes executor. For as it were miſchievous to the executor, if he ſhould by a poſſeſſion in law caſt upon him, ſtand chargeable with theſe goods in remote places purloined, as *Aſſets* in his hands; ſo were it as miſchievous to creditors, if neither executor by right, nor this ſtranger as an executor by wrong, ſhould ſtand liable to creditors for them. It is true, that the right executor may ſue and recover damages for them, and that ſo recovered ſhall be *Aſſets*; but the creditor hath no mean at the Common Law to enforce him to ſue, and perhaps it may be a cold ſuit. And with theſe additions I think *that* late reſolved difference may ſtand firm and ſound. Yet in former times, without ſuch difference, the taking only and poſſeſſion of the goods of the deceaſed was held to create an executorſhip by wrong, as *Belknap* ſaid in the time of King *Edward* the third; and eſpecially if the act were ſuch as removed the property of the right executor, as Juſtice *Fenner* in the late Queen's time ſaid, *teſte meipſo.*

50 E. 3 fo. 9.

Tr. 3 Eliz.

How, and by what name, ſuit ſhall be againſt ſuch, and the like.

TOuching the ſecond point, *viz.* In what manner ſuit ſhall be againſt ſuch: Firſt, in general, this uſurping executor is not in ſuit to be diſtinguiſhed by name from the right executor, but to be ſued generally by the name of executor of the laſt will and teſtament of the

2 Point.

L. 5 E. 4. 72. Co. lib. 5. 30. 31 & 32. b. 21 H. 6. 8.

Vide Coke lib. 5. 2 part fo. 33. b. Reade's case.

defunct; and then if he will deny himself so to be, he must plead that he neither is executor, nor hath administered as executor. Then the plaintiff must prove that he hath administred in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right executor, and yet another doth administer by wrong, it is at the election of creditors either to sue them jointly together, or one or both of them severally and by himself. But if, where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receiveth that power from the ordinary can so be: therefore in that case there is a necessity of suing him apart and by himself (who so usurpeth administration) by the name of an executor.

Co. lib. intrat. 154 But 145 a. in the verdict he is called exec. de injuria. sua prop ia 39 H. 6. 45, 46.

21 H. 8. 8 19. 9 E. 4. 14, 15. 1 & 2 P. & M. Dy. 165. 33 H. 6. 38.

25 H. 6 32.

So if *A.* administer the goods of *B.* not being executor nor administrator, and after his such doing and disposing of the goods, he obtaineth administration of the goods of *B.* but the goods left or coming to his hands since the administration committed suffice not without the other debts received or released, or goods sold before, to satisfy creditors: now if any sue *A.* by the name of administrator, he shall have no farther relief than according to the value or extent of the goods left in or come into his hands since the administration committed; and if those be fully administred, he shall get nothing; if they remain unadministred, but amount not fully to his debt, he must want so much of satisfaction;

R 3 20.

21 H. 6. 8. If the administration were committed before the suit began.

tisfaction; and if he will be relieved or ſatisfied out of the goods before diſpoſed of, he muſt ſue *A.* as executor of *B.* And ſo was it ruled and reſolved by *Gawdy* and *Shute*, juſtices in the *King's Bench*, in the late Queen's time, *viz. Tr.* 30 *Eliz.* And if this now adminiſtrator will plead in abatement of this action, that adminiſtration was committed to him, and demand judgment, if ſuit ſhall be againſt him as executor, then the plaintiff muſt in the replication, as I take it, ſet forth the ſpecial matter, *viz.* how the defendant did adminiſter before adminiſtration to him committed. But if one to whom adminiſtration is committed do devaſt, and this adminiſtration is by ſuit repealed, becauſe he was not the next of kin, and adminiſtration is committed to another; now a creditor who would be relieved out of the goods waſted, muſt ſue *that* firſt as adminiſtrator, and not as executor of his own wrong, ſaid *Popham*, chief juſtice, for he did rightfully adminiſter for that time.

the writ ſhall abate, elſe not, as was of old conceived. Stubb's v. Rightwiſe. Trin. 30 El. Cro. El. 102. Jud. that defen. reſpondeat ouſter.

Vid. 8. 185.

AS for the third, *viz.* How far this executor of his own wrong becomes liable and obnoxious to ſuit; conſider we theſe things.

3 Point. How far liable to creditors.

Firſt, He becomes ſubject both to the action of the executor, who hath right to the goods wrongfully intermedled withal by him, though it were before proving of the will; and alſo to the action of the creditor, who hath right to the ſatisfaction of his debt.

Secondly, As touching the meaſure how far he is engaged, doubtleſs he is not by his wrongful adminiſtring become chargeable with the whole account of the teſtator's debts; but only

ſo far, and with ſo much thereof, as the goods which he ſo wrongfully adminiſtred amount unto. (Yet he muſt look to his plea, elſe by it he may draw all ſued for upon himſelf; as if he deny his being executor or adminiſtrator.) And this ſeems to me proved by the caſe in the time of *Edward* the third, where the inqueſt found not only the adminiſtring or intermedling by the executor wrongfully, but found alſo, by direction of the court, (as it ſeemeth) what the value was of the goods ſo wrongfully adminiſtred, which had not been material, if the adminiſtring of a penny had made one as far chargeable as the adminiſtring of a pound. Beſides, if it be ſo, that a rightful executor waſting goods of the teſtator to the value of 20*l.* ſhall be no farther charged than *that* value, then doubtleſs ſo ſhall it be alſo in this caſe, for both be wrongful adminiſtrations: only this difference there is between them, that in one caſe the adminiſtration is by a wrong perſon, and in the other caſe in a wrong manner. Nay, the Lord *Dyer* doth not ſtick to call him who adminiſtreth wrongfully, or in undue manner, expreſly an executor by wrong, in the caſe of *Stocks* againſt *Porter*, though he were rightfully executor, becauſe he did diſpoſe or execute wrongfully.

Co. lib. intr. 144, 145. Plus de hoc.

1 Fl. Dy. 167. cap. 12.

4 Point. What acts of his of force.

AS to the fourth, *viz.* What acts done to him or by him who is an executor of his own wrong ſhall ſtand firm and good, as done by or to the right executor: ſuppoſe, firſt, that the deceaſed were indebted to him 20*l.* who thus uſurpeth executorſhip, whether may he pay himſelf or not? And this point was in de-

bate in the *King's Bench* between *Coulter* and one *Ireland*, executor of *Hunt*, where it was ſtrongly objected, that notwithſtanding the rightful executor or adminiſtrator might puniſh him, and recover againſt him, for the goods which he adminiſtred; yet another creditor ſuing him as executor generally, and ſo affirming him to be, (for there is no ſpecial form of a writ or declaration to diſtinguiſh an executor by wrong from a rightful executor) he ſtands as againſt him in the ſtate of a rightful executor, and therefore may firſt pay himſelf before he pay others: and of that mind, at the firſt, were *Fenner* and *Gaudy*, juſtices; yet did they admit that this payment ſhould not ſtand good as againſt the rightful executor or adminiſtrator. And *Popham* and *Clinch* held ſtrongly, that neither ſhould it ſtand good againſt other creditors; for then every man would ruſh upon the teſtator's goods, and be his own carver in payment. And whereas it was ſaid at the bar, that the Lord *Anderſon*, upon an evidence at *Guildhall* had ruled it otherwiſe. *Popham* at another day of debate of the ſaid caſe, related that the Lord *Anderſon* did deny that he ever ſo ruled, or was of that opinion, and farther, ſaid that both he and Juſtice *Walmſley*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Juſtice *Gaudy*, as alſo *Fenner*, if I miſtake not, changing their opinions, and concurring with the reſt, judgment was given accordingly. In the debate of this caſe queſtion was made, if ſuch an executor by wrong pay a debt to another creditor by ſpecialty, whether this ſhall not ſtand firm and good, ſince he ſtands liable to creditors ſo far as the goods by him

M. 40. 41 E. Co. l. 5. f. 30. Mich. Cro. El. p. 630.

adminiſtred do amount. And it was agreed, by the better opinion at laſt, that this ſhould ſtand firm and good; ſo as if the payment were out of his own goods, he might retain to himſelf in lieu thereof ſo much of the goods of the teſtator; for here he doth not, as in the other caſe, advantage himſelf by his own wrong. Yet that opinion, allowing this payment to creditors, muſt, as I think, be underſtood with this difference, *viz.* that this payment ſhall ſtand as againſt other creditors, but not as againſt the right executor or adminiſtrator: for then any ſtranger might uſurp the office of executor and take from him that liberty and election, to prefer which creditor he will in firſt payment; yea, might take from the executor power to pay himſelf before others, in caſe there were a debt due to him, which were very unreaſonable.

Of addition and alteration by the ſtatute 43 *Eliz. cap.* 8.

5 Point.

WE having conſidered what the Common Law is and willeth in the premiſſes, let us now ſee what alteration or addition a late ſtatute hath made. In the laſt parliament of the late Queen *Elizabeth*, conſideration being had of ſubtile getting into mens hands goods of an inteſtate by deed of gift, or letter of attorney, from one of ſmall or no ability, to whom ſuch ſubtile contriver hath procured adminiſtration to be committed, and ſo himſelf would ſtand free from the ſuit of creditors, the adminiſtrator himſelf either not being to be found, or not being of any value to ſatisfy creditors; it was therefore enacted, that every perſon receiving

Executor of his own wrong by ſtatute.

ceiving or having any goods or debts of any inteſtate, or any releaſe or diſcharge of any debt or duty belonging to him upon any fraud, as aforeſaid, or without conſideration of or near the value, (except in ſatisfaction of ſome juſt and principal debt, to the value of the goods or debts due from the inteſtate) ſhall be charged as executor of his own wrong, ſo far as the value of thoſe goods and debts amount, deducting all principal juſt debts to him due, and payments by him made, which a lawful executor ought to have paid. Here have we a touch of all the parts precedent, or at leaſt three of them.

1. We have firſt a new executor by wrong, though intermedling under the title of an adminiſtrator.

2. We have a limit of the charge by him incurred, ſuitable to our former expreſſion.

3. Laſtly, we have to him an allowance of debts owing to himſelf, or duly paid to others; which is more than we have conceived allowable to another executor by wrong.

The taking of goods after adminiſtration granted, doth not make an executor of his own wrong. *Salk.* 313.

CHAP. XV.

Of pleas by executors, and which be beſt, which moſt prejudicial to them.

SINCE amidſt the pleas pleaded by executors there is ſuch difference, as that ſome induce one kind of judgment, ſome another, ſome

drawing more loſs and burthen upon executors than others: let us conſider of the differences, ſo as light may be taken to chuſe the ſafeſt or fitteſt for each caſe.

Plea denying the executorſhip, 21 H. 6. 19, 20. Bro. 62. 2 E. 4 f. 4. 19 H 7. 15. Libr. intr. 332, 333 33 H. 6. 33, 34.

If an executor do utterly eſtrange himſelf from the executorſhip, ſaying, that he was never executor, nor ever adminiſtred as executor (for that muſt be added) then if the iſſue be taken upon the plea, and it be found againſt him, the plaintiff ſhall have judgment to recover, not damages only, but even the debt itſelf, out of the proper goods of the executor, if none of the teſtator's can be found to ſatisfy it. And this ſhall be thus not only where it is found that the defendant was made executor by the *will*, and proved it, and ſo could not chuſe but know it; but even alſo where he had never proved the *will* whereof he was made executor, nor ever adminiſtred by virtue thereof: yea, though he did before the ordinary refuſe to be executor of this *will*, or to intermeddle with the execution thereof; yet if any other named executor with him did prove the *will*, or did not refuſe to be executor, let ſuch other refuſer take heed of pleading that plea. For truth is againſt the firſt part of his plea, *viz.* that he never was executor; and ſo the verdict, which muſt be *Veritatis dictum*, muſt needs paſs againſt him, and make his own goods liable as well to debts as damages. What if no other were made executor, but *this* only who refuſed before the ordinary? May he ſafely plead that he never was executor? I think not, ſince he ſo was executor before his refuſal, that he might have releaſed all debts due to the teſtator, and given away all his goods; therefore I think he muſt plead ſpecially,

He was ſuable as ſoon as the teſtator was dead.

tially, ſhewing his refuſal, and not generally deny his being executor. Nay, admit he never was once named, made, or intended to be made executor, yet having pleaded this plea, that he never was executor, nor adminiſtered as executor, if it ſhall be found by verdict that he did adminiſter or intermeddle as executor, the ſame blow or burthen falleth upon him: for then the later part of this plea is found untrue, yea the whole upon the matter, for by this adminiſtring he became an executor of his own wrong, and the denial of this executorſhip by wrong or uſurpation ſhall be as penal to him as the denial of a rightful executorſhip. The like law where the executor pleads a releaſe made to himſelf, or a payment of the debt, or other performance of the condition made by himſelf. Nay, I find in this later caſe the judgment entered generally againſt the defendant, as againſt another for his own debt, not being executor. And the reaſon why the law makes theſe ſo penal to an executor is, becauſe his plea is not only falſe, but the falſhood thereof was willful, ſince it muſt of neceſſity be known to himſelf to be ſo. And laſtly, for that all theſe pleas, if they had proved true, had been perpetual bars, at leaſt againſt the defendant: the firſt indeed had not been a bar againſt another, being in truth executor or adminiſtrator. But if the executor had pleaded a releaſe made to his teſtator, finding ſuch an one among his writings, which yet was either forged, or never both ſealed and delivered by the plaintiff as his deed? or if he plead payment

The plea of ne unques Executor is that he never was executor, nor ever adminiſtred as ſuch. Co. Ent. 144. But if he did it as adminiſtrator, it is otherwiſe; yet ſee that ſpecially pleaded, Co. lib. intr. 148. a. Lanu and Aldred.

See Co. lib. intrat. Judgment ſo entred. 145. b. Read and Carter's caſe. Hill. 41. in C. B. Rot. 401. De bonis & catallis que fuer. præd. (teſtator) tempore mort's ſuæ in manibus præd. def. adminiſtrand. &c. Si tantum inde in manibus ſuis habeat, &c. Et ſi non habeat, tunc debitum & dampna præd de bonis & catallis ipſus def. propr. levand, &c. Reade's caſe. Ne unques, executor pleaded. Co. Lib. Intr. 29 a. not firſt de bonis teſtatoris ſi, &c. See Bro. Ex. 22. theſe reaſons: for this d ff. 33H. 6. 23, 24.

So of other perform. Co. Lib. Intr. 153. and 6E 4. 1. 7E. 4. 8. See Bro Ex. 22. That the book contrarily reported, 34 H. 6. 22, 23. is erroneous, as was deſcried by Fitz. & al. 23 H. 8. the record being not ſo as the book ſaith the judgment was.

ment made by his teſtator; neither of theſe pleas found againſt him ſhall cauſe the judgment to faſten upon his own goods: ſo if he denied the bond or bill, whereupon the ſuit is grounded, to be the teſtator's deed. For in all theſe caſes the truth being not known to him, he might honeſtly and reaſonably conceive it to be as he did plead. But what if he plead fully adminiſtered, and this be found againſt him, which reſted in his own knowledge? Shall not this falſe plea expoſe his own goods, in defect of his teſtator's, to the ſatisfaction of this debt? No, it ſhall not, for that though this were a falſe plea, and that within his own knowledge, yet was it not a perpetual bar; for if it had been ſo found as was pleaded, yet *Aſſets* coming after to the hand of the executor, the plaintiff ſhould then have relief and ſatisfaction out of theſe ſince accrued *Aſſets*. If any aſk how *Aſſets* may after come, I will give him two or three inſtances. Firſt, it may be by recovery of debts before with-holden, or of damages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the teſtator, having a leaſe for twenty years, did demiſe the ſame to *J. S.* for the whole term, if he ſo long ſhould live; if he were alive in time of the former verdict, but now is dead, the term continuing; this is now *Aſſets*, which before was not, whilſt it was but a poſſibility of a term. Other inſtances might be given, but theſe may ſuffice. If the executor pleaded that the teſta-

Lib. Intr. 147, 149. This good, though the judgment were by non ſum informer. 11 H. 4. 6. There a Cap. ad ſat. was awarded for the damages. and an averment that it was without Covin. Co Lib. Intr. 152. on de-

tor

tor ſtood bound in ſuch a ſtatute, or that there was ſuch a judgment againſt him of debt to the king, beyond the ſatisfaction whereof the goods would not reach; this is in effect a *fully adminiſtered*, though ſpecial, and not general; and the law is alike (as I take it) in all theſe caſes, as to the not making of the executor's goods liable. But in all theſe caſes, though the debt ſhall not be adjudged upon the executor's own goods, yet the damages ſhall, in default of the teſtator's goods to ſatisfy them. And in theſe caſes it is not material whether the judgment paſſed upon trial or demurrer, Nay, if the defendant executor plead no plea, but confeſs the action generally, or be condemned by *Non ſum informatus*; the judgment is the ſame, *viz.* to recover the debt only out of the teſtator's goods, and the damages of the executor's goods in default of the teſtator's. What if the executor defendant confeſs that he have *Aſſets* to the value of part of the debt, not of the whole? There for ſo much as is confeſſed the plaintiff may pray, and have judgment preſently without damages, and may maintain for the reſidue of the debt, that the defendant alſo hath *Aſſets* for the reſt, and ſo go to trial; as appears both by the printed book of entries, and other manuſcripts which I have. But what if this trial paſs for the plaintiff? Shall he then have an additional judgment for damages in reſpect of the former? I think he ſhall have coſts, which commonly run with or in the name of damages; but without a writ to inquire of damages, none being found by verdicts, the court doth not uſually adjudge damages. Yet in the book of *Entries* I find 6 *s.* 8 *d.* damages aſſeſſed by the court upon a confeſſion

But he may, I think, forbear ſo to do, and to the judgment for part that when more aſſets come he ſhall have more. Lib. Intr. f. 223. In Treſham's caſe defendant pleaded ſeveral ſtatutes and recog. plaintiff replies ſatisfaction, and being made for performance of Covenants performed, judgment on demurrer for plaintiff is to recover debt and damages de bonis quæ fuer &c. Si tantum inde in manibus ſuis habeat, &c. Et ſi non habeat tunc dampna præd. de bon. & cat. ipſius def. propr. levand. Co. Lib. Int. 152. Brokeſby and Treſham.

feſſion in a *Writ* of *rationab. part. bonor.* againſt executors, and this hath much affinity with an action of debt. Yea, in the very action of debt where the jurors for miſcarriage after their departure from the bar were fined, I find that the plaintiff renouncing the aſſeſſment of damages by them made, and praying the court to aſſeſs the ſame, it was done accordingly: but this was a ſpecial caſe.

M. 28 H. 6. Ro. 2. 321. Lib. Intrat. 329. 2.

Whereas we before ſhewed that an executor denying his executorſhip ſhall, if it be found againſt him, pay the debt of his own goods for his falſe plea; this thereabout occurreth to be added, *viz.* that *that* is only where the immediate executorſhip of the defendant is denied. For if *B.* be made executor by *A.* and *B.* dying makes *C.* his executor; now if *C.* be ſued for the debt of *A.* as executor of *B.* executor of *A.* and he denieth that *B.* was executor of *A.* which by conſequence is a denial of his being now executor of *A.* yet if this fall out in trial againſt him, he ſhall not in his own goods ſtand liable to this debt, becauſe it is poſſible that he might not know to whom his teſtator was executor. So if *A.* made *B. C.* and *D.* his executors, and *E.* is ſued as executor of *D.* the ſurviving executor of *A.* if *E.* deny that *D.* his teſtator ſurvived *B.* and *C.* by conſequence whereof he denieth the truth, *viz.* that the executorſhip of *A.* is devolved to him, yet ſhall not this, found againſt him, charge his own goods; for he might be ignorant of this point in fact, *viz.* whether *B. C.* or *D.* lived the longeſt. And here he denied not his own immediate executorſhip, but a mediate or more remote executorſhip. And ſo, I think is the law, where *C.* being ſued as executor

See Lib. Intr. 322.

cutor of *B.* executor of *A.* he pleads that *A.* by a later teſtament made himſelf executor, which is found againſt him; ſo as here he falſly pleaded, and pretended himſelf to be the immediate executor of *A.* and ſo denied the mediate executorſhip, *viz.* of *B.* to *A.* and of him to *B.* Yet *Quære* of this; for why ſhould not as well his falſe making himſelf an executor immediate to the indebted teſtator charge his own goods, as well as his falſe denying of that executorſhip; ſince both pleas tend to the overthrow of the plaintiff's action, and each equally reſted in the defendant's knowledge? But this difference is between them apparent, *viz.* That the denial of executorſhip, if true, is an utter and perpetual bar to the plaintiff, as againſt him ſo pleading; but the affirming of an immediate executorſhip, where he was ſued as executor mediate, doth not ſo, if true, but directs the plaintiff to a better writ or action, *viz.* againſt him as immediate executor to the indebted teſtator.

Whereas we have before touched upon the coming of *Aſſets* futurely to executors, I think it is not amiſs to conſider a little the form and frame uſual in pleas of fully adminiſtred, which thus run, *viz.* *Quod die impetr. &c. plene adminiſtravit omnia bona & catalla quæ fuerunt præd. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. præd. S. temp. mortis, &c.* Lib. Int. 151.

Thus tying his denial upon the things which were the teſtator's at the time of his death, what if then the executor have, at the time of this plea pleaded, goods which were not the teſtator's at his death, but ſince accrued, as before is ſhewed; or perhaps a leaſe for years ſold by the teſtator, upon condition to be void, if five hundred pounds 7 H. 4. 39. Bro. 50. This plea is not good, per Cur. becauſe ſome may have ſince accrued.

pounds not paid at ſuch a day, which happening after the teſtator's death, and default made, the term returneth; or, if the executor by a writ of error reverſe a judgment given againſt his teſtator for two hundred pounds, and ſo is reſtored thereunto? May the plaintiff now reply generally, that he hath *Aſſets* which were the teſtator's at the time of his death? How can the jury ſo find, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a precedent of a ſpecial plea therein. But in reaſon methinks it ſhould be ſpecially, and not generally, pleaded and ſet forth in the replication. And in caſe where one ſued as executor denieth that he was ever executor or adminiſtred as executor, I find ſometimes the replication general, that he did adminiſter, without ſhewing wherein or how; and ſometimes ſpecial, ſhewing what thing was adminiſtred, and where. Here note, that the executor defendant denying (as he muſt) two things, *viz.* 1. That he ever was executor. 2. That he ever adminiſtred as executor: the plaintiff in his replication is tied to maintain but the one of them, as the truth of the caſe is: that is, if in truth the defendant where made executor, but never did adminiſter, now it muſt be replied, that he was made executor at ſuch a place, without ſpeaking any thing of his adminiſtring: on the other ſide, if he did adminiſter, but was not made executor, then only the adminiſtring is to be replied. But if it ſhall be found that the defendant had adminiſtration to him committed, and ſo adminiſtered by virtue thereof, then is the verdict to paſs for the defendant, for this is no adminiſtring as executor; and upon a general denial thereof

Lib. Intrat. 322. a. b. but a place muſt be ſhewed, So 11 H. 6. 19. 20. Br. 62.

Replication only to the adminiſtration. So done Co. Lib. Intr. 144. b. Read v. Carter.

thereof this may be given in evidence, as the Lord *Dyer* reports to have been reſolved. But if the plaintiff do in his replication maintain both the points, ſhall this make his plea double? Methinks it ſhould; yet I find it ſo replied, and no exception taken for the doubleneſs, *Trin.* 17 *H.* 8. *Rot.* 28. Mich. 13 & 14 El. Dy. 30. Lib. Intr. 312. b. Tr. 37 Eliz.

A ſole woman being executor, maketh a deed of gift of the teſtator's goods in truſt, but continueth poſſeſſion of them, and marrieth *J. S.* who alſo hath poſſeſſion of the goods, and in an action of debt by a creditor fully adminiſtred is pleaded; now upon evidence the verdict ſhall paſs for the plaintiff; for this alienation, being fraudulent; was void to all creditors, and ſo as to the plaintiff the goods continued the teſtator's, and ſo *Aſſets* in the defendant's hands, as was held in the *Kings Bench*. If fully adminiſtred be pleaded where the defendant hath *Aſſets* for part, but not ſufficient for all, and ſo it is found; yet ſhall not judgment be given for the whole, but for part preſently, with a farther award, that when more ſhall come to the executor's hand, the plaintiff ſhall then have farther judgment for the reſt: ſo as that falſe plea doth him no prejudice, but makes him in as good ſtate (the charges of trial excepted) as if he had confeſſed himſelf to have part. And I think the plaintiff upon that confeſſion of part may pray the like judgment, without maintaining that the defendant hath ſufficient for the reſt; for if that be not true, why ſhould he be put to the charge of a trial by jury? Yea, Sir *Edward Coke*, at the bar, *Tr.* 36 *Eliz.* ſaid, that where fully adminiſtred is pleaded, the plaintiff is not tied to maintain the contrary, Yet Finch, 46. E. 3. f. 9, 10. held the contrary, viz. that judgment ſhould be of the whole, but execution only for ſo much, and a Scire fac. for the reſt when more Aſſets. See Coke. l. 8. fol. 134.

contrary, but may preſently pray and have judgment to recover it when *Aſſets* ſhall futurely come to the defendant's hands: which was denied by ſome. But truly methinks the law ſhould be as he ſaid as well as in the former caſe, where for the part which the defendant had not *Aſſets* to pay, it was done, upon verdict ſo finding. But there as I conceive, it was not a preſent judgmenr, but an award that he ſhould have judgment futurely; ſo as after when *Aſſets* come to the defendant's hands, the plaintiff muſt have a *Scire facias* againſt the defendant, to ſhew cauſe, not why he ſhould not have execution, but why he ſhould not have judgment, as I take it: yea, where it is found for the defendant that he hath fully adminiſtred, yet was it held by all the juſtices, 33 *H.* 6. 23, 24. and by *Priſot*, 34 *H.* 6. 24. that when *Aſſets* after come to his Hands, the plaintiff ſhall have a *Scire facias* to have ſatisfaction out of them: but that *Markham*, *Yelverton* and *Forteſcue* were of contrary opinion, and ſo was the whole court, 4 *H.* 6. *fol.* 4. And it ſtands with great reaſon, that where, upon a verdict fully found againſt the plaintiff, judgment is given *Quod nihil capiat per breve*, there he cannot have any writ to execute the judgment for him, but is put to a new action of debt: yet where it is found that the defendant hath *Aſſets* for part of the debt, but not ſufficient for the whole, there it is very congruous that the plaintiff have preſently judgment for part, and after, when more cometh, then by *Scire facias* againſt the defendant obtain judgment and execution for the reſt: for here both verdict and judgment were for the plaintiff againſt the defendant, whoſe plea,

So 19 H. 6. f. 37. 8 E. 4. fol. 25. See judgment ſo entr. 151. b. So 7 E. 4. f. 7.

plea, that he had no goods, was falſe, and ſo found by the jury. And this difference was ſtrongly avowed by Serjeant *Henden*, *Mich.* 33, 34 *Eliz.* and after approved by *Fenner* Juſt. 36 *Eliz.* none contradicting it: yet a book was cited, that the plaintiff recovering ſo much as was found in the executor's hands, he ſhould be amerced for the reſidue; which *Popham* chief juſtice denied to be law. This 21 H. 6. 40, 41.

Ideo Conſ. eſt, quod præd. les plaintiffs nihil capiant per breve ſuum præd. ſed ſint in mi'a pro falſo clamore ſuo inde, Et præd. les def. eant inde ſine die, &c. Co lib. intr. 151. *b.* There was a verdict for the defendants executors of an executrix, *quod non habuer. bona, &c.*

CHAP. XVI.

Where judgment ſhall be againſt the executor's own goods, though no plea of the defendant nor vaſtation do ſo occaſion: and of the ſeveral manners of judgment in ſeveral caſes.

HOW by waſting, called by us commonly a *Devaſtavit*, an executor may draw down the execution upon his own goods, hath formerly been handled and diſcourſed of; as alſo what kind of pleas do make the executor's own goods liable to the debt, and what not. Now let us ſee where, without miſadminiſtring, or miſpleading, yet the nature of the action ſhall lay the whole debt or thing recovered upon the executor's own goods. And this we ſhall find in ſome few caſes. 1. Where an executor is ſued for rent accrued and behind after his teſtator's death, upon a leaſe for years made to the teſtator and by him left to his executor; here For rent behind ſince teſtator's death.

it ſhall be adjudged and levied upon his own goods; for that ſo much of the profits as the rent amounted to ſhall be accounted as his own goods, and not his teſtator's; therefore he is to be ſued as well in the *Debet* as in the *Detinet*, where in other caſes he is not, but in the *Detinet* only, being ſued as executor. So if any thing delivered to, or detained by his teſtator, come to his hands, and he ſtill detains the ſame after the demand, and be thereupon ſued in an action of detinue; for this is his own act. Nor in this caſe need he to be named as executor, for he ſhall not anſwer damages for his teſtator's detaining. So if he aſſume to pay out of his teſtator's *Aſſets*, and be ſued upon this *Aſſumpſit*, and which debt is to be recovered in damages, and that out of the executor's own goods; yet is this action, and the aſſumption, which is the ground thereof, founded in the executorſhip, and his having *Aſſets*; for if either he had not been executor, or if he had not *Aſſets* at the time of the promiſe, it had been *nudum pactum*, and would not have bound him, nor given good cauſe of ſuit. Nay, to go farther, in the caſe of aſſumption by the teſtator, and ſuit againſt the executor thereupon, we find the judgment in Mr. *Plowden*'s Commentary given againſt the executor generally, as if he had not been an executor, not fixing it upon the teſtator's goods; yet there the very debt itſelf is included in the damages. But contrarily was it after in the ſeventh year of the late king. *viz.* Judgment given, that as well the damages as the coſts ſhould be levied of the teſtator's goods, if ſo much in value of them were in the defendant's hands; and if not, then were coſts only of the goods of the executor. And this ſurely is the righter and more juſt way; fo ther

the ſuit is in the debet & detinet

5 Mariæ. f. 112. Read and Norwood's caſe, Co. lib. Intr. f. 1, 2.

there is no reaſon that upon a promiſe, more than upon a bond, the law ſhould caſt the whole debt upon the back and eſtate of the executor. But perhaps the two judgments may be reconciled thus: the later was given upon a verdict, *Non aſſumpſit* being the iſſue, and there the jury aſſeſſed damages in certain, *viz.* 523 *l.* with the coſts; ſo as here the judgment was compleat and full, *viz.* to recover the ſaid ſum: but in the other caſe the judgment was had upon a demurrer, ſo that the damages not being known, it was generally, that the plaintiff ſhould recover his damages againſt the defendant. *Sed quia neſcitur quæ damna, &c.* Becauſe it appeareth not to the court what the damages were, therefore a writ was awarded to enquire of damages, upon the return whereof executed, the judgment was fully and compleatly to be given of a ſum in certain: which ſecond judgment it appears not by the book in what manner it was entered, and therefore might perhaps be then agreeable with the other. And that the ſaid firſt judgment, before damages enquired of, is not a plenary and full judgment, but an award of judgment, hath been divers times reſolved; and that therefore any defect and inſufficiency in the declaration may be ſhewed time enough after the firſt, and before the ſecond judgment: Yea, if the plaintiff die before the ſecond judgment, though after the firſt, † the action falleth to the ground: ſo if the defendant die: otherwiſe of death after full judgment. But this notwithſtanding, and howſoever there were done

Tr. 30 Eliz. Paſc. 33 E. in Com. Ban.

† But ſee the Stat. 8, 9. Will 3 ch. 10. in what caſes actions ſhall not abate.

upon the ſecond judgment, methinks it were righter and fitter that the damages ſhould be had and levied out of the teſtator's goods, for whom and in whoſe right the executor is ſued.

For breach of covenant ſince the teſtator's death.

Another caſe there is, wherein the judgment muſt be, as it ſeems, againſt the executor's own goods, *viz.* in an action of covenant for a breach of covenant ſince the teſtator's death: for ſo was it held both by all the judges of the *Common Pleas*, except the Lord *Dyer*, and by the prothonotaries in the late Queen's time; where the caſe was of an houſe upon the leaſe negligently burned in the executor's time; for which damages only were to be recovered. And ſometimes where the executor himſelf is to bear the burthen, I find the judgment entered, that the ſum recovered ſhall be levied of the lands and goods of the executor.

Lib. intr. 329. a. & b. de terris & catallis, &c.

Judgment pleaded for 5000 *l.* on a note payable with intereſt, which intereſt amounted to 1700 *l.* was adjudged a *Devaſtavit*; for the adminiſtrator ſhould not have ſuffered ſo much intereſt to be in arrear. 1 *Lev.* 39.

CHAP. XVII.

Of women-covert executors.

THere being two kind of perſons who have ſome diſability upon them, *viz.* Femecoverts or married women, and infants, touching whom we find in many places queſtion and debate in our books, we will conſider of them by themſelves, or apart from others; yet not joining them together neither, but each by himſelf ſeparately.

Firſt,

Firſt, Therefore, of feme-coverts; touching whom we will conſider theſe three things.

Firſt, whether they may make *wills* and executors with or without their huſband's aſſent; and how, whereof, and in what caſes.

Secondly, whether they may be made executors without their huſbands aſſent, or how their huſbands may hinder it.

Thirdly, what acts in execution of the executorſhip they may do without their huſbands, or their huſbands without them.

A woman married, or feme-covert, we know is *ſub poteſtate viri, cui in vita contradicere non poteſt*, as ſaith the writ given by the law to the wife for recovery of her land after her huſband's death, being aliened by him. Therefore it is, that judges, when a woman is to acknowledge a fine of any land, do examine her apart from her huſband, to know whether ſhe be willing, or come to do it by the compulſion of her huſband: it is therefore hard for her to have freedom of will, and conſequently freedom to make a *will*. Beſides, all her moveables or goods perſonal, which ſhe had at the time of her marriage, otherwiſe than as executrix or adminiſtratrix are by the law totally deveſted out of her, and ſettled in the huſband as fully *ipſo facto* upon the very marriage, as any other that were his own before. Of theſe therefore ſhe can make no diſpoſition, no more than of other her huſband's goods. But in caſe ſhe do by *will* bequeath them, although the *will* and the gift be void, yet if the huſband, as the caſe was in the time of *Edw.* the ſecond, do after his wife's death conſent to this her *will* and gift, by delivering of the goods bequeathed, after her death, or aſſenting that the

Sect. 1.

Sola & ſecrè è examinata.

Debts except, which are not properly goods.

5 E. 2. Fitz. Deviſe. 24.

legatee take them by virtue of ſuch *will* and gift; this amounteth to a new gift by the huſband. If a woman have a leaſe, an eſtate by extent, a wardſhip, the next avoidance of a church, or other chattel real; theſe are not deveſted out of her into her huſband by marriage, but in caſe ſhe overlive him, they continue to her as before; no alienation or alteration having been made by the huſband, who had power to diſpoſe of them by gift in his life-time, though not by his *will:* yet ſuch a woman in her huſband's life-time could not, of, or for theſe things, without her huſband's aſſent, make an executor or *will*, but ſhe dying before him, they would by the operation of law, accrue to him. And here then obſerve a caſe, though not frequent, yet full of miſchief when it happens: ſuppoſe that a woman indebted a thouſand pounds, and having leaſes and moveable goods to the value of three thouſand or four thouſand pounds, marrieth with *J. S.* and then dieth before the debt recovered againſt her; in this caſe the huſband ſhall have and go away with all this value of his wife, and is not in law liable to pay one penny of her debts, becauſe he is neither her executor nor adminiſtrator. What the *Chancery* could do, or rather what the lord chancellor or lord keeper would do, in this caſe, I will not take upon me to ſay or determine. Another ſort or kind of goods, or rather intereſts, a woman may have, *viz.* debts or things in action, which as the former, are not deveſted out of her by marriage into her huſband, nor yet can ſhe thereof make an executor without her huſband's aſſent, although they be one degree farther from the huſband than the ſaid chattels real; for that though

During her life he is, but not after, and if he was her executor or adminiſtrator, ſuch goods could not be aſſets.

But the huſband may receive them or releaſe them 12 H. 7. f. 22.

though the husband do over-live the wife, he shall not be entitled to them as to the former. But if his wife make him executor, as she may, or if after her death he take administration of her goods; then, as he is thereby entitled to them, so is he liable also to pay her debts out of the same, when he shall have received them.

The husband was sued in spiritual court as executor to his wife.

Lastly, *Dato* that a woman-covert is executrix to some other person, and in that right hath goods moveable; these are not devested out of her, because she hath them not meerly to her own use, but as representing the person of another: but whether then may she without her husband's licence or assent, in respect of her being an executor, and for continuation of this executorship, make executors, and consequently a will, or not? Hereabout hath been much diversity of opinion. Some books generally speak, that the wife may make an executor, but speak nothing of the husband's assent, whether necessary or not. Elsewhere we find it mentioned, that if the husband after the wife's death countermand (some books, false printed, say command) the proving of his wife's *will*, then it looseth all force, or becometh void and of no value: but in this case is no mention in what state this wife stood, *viz.* whether she were executor or not, no not so much as whether she had any thing in action, or chattel real or not, so as nothing in particularity can be grounded upon that case. But there are express opinions, that the husband's assent is absolutely necessary even in this case, so as without it the wife's making an executor shall be meerly void, and, consequently, he to whom she was executor shall now by her death be dead intestate. And of this

So she is often to former husband and to father, &c.

39 H. 6. f. 27.
34 H. 8. f. 8 Bro. Testaments, 21.

18 E. 4. f. 11. Vavasor, just.

4 H. 6. f. 31.

this opinion was *Babington* chief juſtice, in the beginning of *Henry* the ſixth his time. Yet contrary hereunto was the opinion of *Fineux*, chief juſtice, in the time of King *Henry* the ſeventh, *viz.* that where the wife is an executor, ſhe may alſo make a *will* and an executor without any conſent or aſſent of her huſband. And to this opinion doth maſter *Perkins*, after conſideration of the books on both ſides, incline. But ſome will ſay, that ſince all this, in the late Queen's time this hath been contrarily reſolved, *viz.* in the caſe between *Andrew Ognell* plaintiff and *Underhill* and *Appleby* defendants; in the end of which caſe it is in expreſs terms ſaid to have been then reſolved, that a feme covert or married woman could not make an executor without the conſent of her huſband. To this I anſwer, that this caſe is to be conſtrued with relation *ad materiam ſubjectam*, *viz.* to the matter and point in queſtion and under conſideration, which was that ſtate of a woman whereof we have before ſpoken, *viz.* one having things in action, debts or duties to her belonging, as there in particular it was arrearages of rent due to the woman before marriage. As for the point of a woman executor to another perſon, it was never in that caſe under † diſceptation, nor once mentioned in the debate or arguments thereupon. Now conſidering the very form and phraſe of judgments at the common law, which are thus, *viz.* *Ideo conſideratum eſt per Curiam*, *&c.* not, *Adjudicatum eſt*, that is, it is conſidered

12 H. 7. 24. b.

Tit Deviſe. f. 27. Hil. 29 El. in Com. Ban.

Co. lib. 4. 51. b.

† [Diſceptation] this word is obſolete, it is diſceptatio in latin, and ſignifies a diſputing, debating, or reaſoning. Ainſworth's Dictionary.

by

by the court, not in expreſs terms, that it is adjudged; this, I ſay, well obſerved, (as to me it ſeems very remarkable) gives us to know, that no more is adjudged than is conſidered of, the judgment being contained and claſped up in the words *Conſideratum eſt*. Wherefore ſince in *Ognell*'s caſe the point of a woman covert's ability, in caſe where ſhe is an executor, to make a will and executor, hath not been conſidered of, (the eyes, tongues nor thoughts of the judges being once ſet upon it,) it cannot be that that point is there reſolved or adjudged. Beſides, even in a few words expreſſing, as to me it ſeems, the reaſon of that reſolution, it appears not to have been the intent of the judges, that the ſame ſhould reach or extend to this caſe of a woman-covert executor: for it is added (as the reaſon of the judgment, in my conceiving) that the adminiſtration of the wife's goods doth of right belong to the huſband; which amounts to this, in my underſtanding, *viz.* that where the wife's making of a *will*, and conſequently of an executor, may be prejudicial to her huſband, and prevent him of ſome benefit or advantage, or tend to his loſs and diſadvantage, there it ſhall not be available or effectual without his aſſent; and therefore not in the caſe of her, who, having debts or duties to her due, would, by making another to be her executor, exclude or preclude her huſband from that benefit which to him ſhould pertain as adminiſtrator of her goods. Now as for the goods, debts or credits to her as executor to ſome other pertaining, no benefit could redound to the huſband by having ſuch adminiſtration of his wife's goods, for thoſe ſhould go and be to the next of kin of the wife's teſtator,

teſtator, taking adminiſtration *de bonis not adminiſtratis* of him, if ſhe have no executor; and therefore her making executor, as touching theſe, brings no hurt or prejudice to her huſband, and ſo is out of the reaſon of *Ognell*'s caſe. Since then it is ſo, and ſince the law favoureth *wills*, and it was by implication part of his *will* who made her executor, that ſhe ſhould have power to continue his executorſhip, by making another to ſucceed therein after her deceaſe, for performance of his *will*; why ſhould the law give to the huſband, who can receive no prejudice thereby, power to give impediment thereunto? For, *Fruſtra eſt inutilis potentia*; even reaſon itſelf ſtands and awards againſt him in this caſe a *Quare Impedit*, or rather a *Non Impedit*, as to me it ſeems. Wherefore to conclude, I take it that the opinion of *Fineux* is good law in that point of a feme-covert executor, though not in the other point, where ſhe hath only debts or things in action to her ſelf due; for therein the ſaid reſolution in *Ognell*'s caſe, grounded upon good reaſon, gives me ſatisfaction to differ from *Fin.* who making no difference between the caſes, held the huſband's aſſent needleſs in both. *Poſito* then the wife of *J. S.* having debts due to herſelf, and being alſo executrix to *J. D.* makes without her huſband's aſſent *J. N.* her executor, and dieth; what ſhall we now ſay? Shall we ſay, that as touching the goods and credits or things in action to her as executrix of *J. D.* pertaining, this *will* ſtands good, and *J. N.* as her executor, may prove it, contrary to her huſband's *will*? And that as to the credits to herſelf in her own right pertaining, the *will* is void, and thereof her huſband may take adminiſtration?

tion? ſhall She die both teſtate and inteſtate, with a *will*, and without a *will*? Shall we have both an executor and adminiſtrator? Why not, to ſeveral purpoſes, as well as where an executor is made only for one particular thing or one place, the teſtator may elſewhere die inteſtate? And ſo where the executorſhip is devided, as before is ſhewed, and one to whom part is committed will prove the *will*, but the other to whom other part of the executorſhip is committed will not take it upon him; here muſt needs be a dying for part teſtate, and part inteſtate. *Vide poſt Sup. p.* 20, 21.

As for the ſecond point, *viz.* wives or women-coverts being made executors, and ſo having the office of executorſhip put upon them againſt their huſband's *will*, there has alſo been diverſity of opinions. In the time of King *Edw.* 1. *Brab.* juſtice, ſaith ſhe may be executor without her huſband, and the adminiſtation ſhall be delivered to her only. And I think he meant that this might be without the conſent of her huſband, or whether he would or not; for ſo it is ſaid in the time of King *Hen.* the ſeventh to be the law ſpiritual: and indeed in courts ſpiritual no difference is made between women married and unmarried, for ought I can find. There a wife ſueth, and is ſued, alone without her huſband; he intermedleth not, nor is intermedled withal, touching the things pertaining to his wife. But at the common law it is otherwiſe; and there, as *Brian*, chief juſtice, ſaith, a wife without the aſſent of her huſband cannot be executor, he meaning thereby that the huſband may oppoſe and hinder it; for ſuch a one may be named executor in and by a *will*, without the knowledge

13 Ed. 1. Fitz. Ex. 119.

2 H. 7. 15. b.

2 H. 7. 15.

ledge of her husband. Let us then see how after the death of the testator the husband can hinder her proving the *will*, or intermedling to administer, since it may be a matter both of much trouble and danger to him to have the executorship fasten upon his wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the husband; and therefore we will also consider, whether the husband may (though his wife would refuse) assume the executorship, and fasten it upon her. The testator therefore being dead, and fame or common bruit carrying it to the ordinary, that the wife of *J. S.* is made executrix; if she come not in *gratis* or voluntarily to prove the *will*, process or a citation is to be sent out of the spiritual court against her, to enforce her coming in to take on her the executorship. She coming may clearly, as well as any other person, (especially if her husband concur with her therein) refuse this office, trust and charge, so as if there be no other executor named, the ordinary must commit the administration. If she should not come and appear, she should be excommunicate, as I take it, notwithstanding any allegation or intimation by her husband of his unwillingness to have her take upon her the executorship. But suppose she doth come into court, and offers herself ready to take the executorship upon her; and on the other side her husband expresseth his dissent thereunto, praying that she may not have the execution of the will to her committed: what will then be done? This, I confess, pertains to another learning, and not to that of our profession. But forasmuch as I find, that in the courts spiritual a wife stands in the same plight

plight and ſtate as a woman ſole, the huſband not intermedling withal in the affairs of the wife; therefore do I conceive, that in that court the huſband's refuſal will not be of force to hinder the committing of the executorſhip to the wife not refuſing; at leaſt if their come not a prohibition to ſtay ſuch proceeding in the ſpiritual court. But whether a prohibition be in ſuch a caſe to be granted or not, as I find no reſolution in my books, ſo will I not take upon me to reſolve. This ſtands clear in the rules of the law of *England*, that the wife is under the huſband's power, and cannot contradict him in pleading and doing other acts, even touching her own freehold: nay, ſhe cannot take lands nor goods by gift or conveyance without her huſband's aſſent, as the law hath been, and, for ought I know, is taken. But if once the *will* be proved; and the execution thereof committed to the wife, though againſt her huſband's mind and conſent, I think it will ſtand firm; and the huſband and wife being after ſued, cannot ſay that ſhe was never executrix. And I doubt whether the wife adminiſtring without the huſband's privity and aſſent, although the *will* be not proved, do not conclude her huſband as well as herſelf from ſaying after, in any ſuit againſt them, that ſhe neither was executor nor did ever adminiſter as executor. Yet perhaps this adminiſtration by the wife, againſt her huſband's mind, will (as againſt him) be as a void act; elſe cannot I ſee how *Brian*'s opinion before cited, *viz.* that the wife ſhall not be executor without or againſt her huſband's mind, can be law. On the other ſide, if the huſband of a woman, named executor, would have his wife

33 H. 6. 31. 45.
39 Ed. 3. 1.
27 H. 8. 24.

11 H. 6. 4. The plea is, that the feme did, or did not adminiſter, without ſpeaking of the huſband.

33 H. 6. 31. The husband may administer, and prove the *will* for his wife.

wife to take upon her the execution of the *will*, and to prove the same, but she will not assent thereunto, (wishing, perhaps, that gain and benefit rather to some of her kindred by way of administration, than to her own husband by her executorship, as sometimes wives accord not well with their husbands;) in this case I think the court spiritual, will not fasten the executorship upon the wife against her will. But *dato* that the husband, though the *will* be not proved, doth administer as in the wife's right, but against her mind and *will*; shall she be now hereby bound and concluded, so as after she cannot decline or avoid the executorship? And surely I think, that during her husband's life she stands concluded at the common law, so that there she shall not be nor can be sued alone an executor, and then being sued with him, she must join in plea with him, *viz.* that she neither was executor, nor administred as executor; and then this act of her husband's given in evidence will, as I take it, cause that the verdict be found against her: not so after her husband's death; for then she may refuse, as the L. *Dyer* saith, and citeth as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be where a woman so made executor taketh a husband after the testator's death, before either proving or refusing to prove the *will*, and where she is made executor during the coverture; as there in case of a descent of her land to the heir of a disseisor; for when there is upon her such a state of election, she, marrying before her resolution or determination, doth upon the matter deliver it into the husband's hands:

1 Eliz. Dyer 166. 1. the case is cited.

3 H. Rot. 112. Nota per bill.

hands: not ſo where it firſt findeth and falleth upon her in the ſtate of coverture. If the huſband were indebted to the teſtator, this making of the wife executor is, as I take it, a releaſe in law, as well as if ſhe were the debtor: but if after the teſtator's death ſhe do marry ſuch a debtor, it is a devaſtation,

The third point.

Touching the adminiſtration or execution of the office of an executor by a feme-covert and her huſband.

WE will now come to admit the execution of the *will* aſſumed by concurrent conſent of huſband and wife, and the *will* proved with both their likings in the wife's name; and examine what acts the wife of her ſelf is able to do, and what her huſband without her.

It hath been conceived by many of old, and by ſome of late, that if a feme-covert or married woman executrix releaſe a debt of her teſtator, or give away the goods which ſhe hath as executor, or deliver a legacy bequeathed, it was firm and good; and on the other ſide, that her huſband's gift or releaſe was of no value, for that the adminiſtration or execution of the *will* is committed to the wife only, And ſome have gone ſo far as to ſay, that ſhe may ſue or be ſued without her huſband, (in the courts of common law, I mean; for in the ſpiritual court it is true, the huſband is not joined with the wife in ſuit.) But the law is doubtleſs in all thoſe points contrary, as not only ſome opinion alſo was of old, *viz.* in the time of *H.* 7. but

See 18 H. 6. 4. In debt the plea ſhall be, that ſhe hath fully adminiſtered; and reply, that ſhe hath Aſſets, never mentioning the huſband.

alſo hath been in the late Queen's time reſolved: for otherwiſe, if the wife's gift or releaſe ſhould ſtand good, her act might exceedingly endamage her huſband, and make his goods liable to the creditors, the teſtator's eſtate being waſted by the gifts or releaſes of his wife. Wherefore it was held in the ſaid late caſe, that unleſs due payment were made to ſuch woman-covert executors, their releaſes or acquittances be void, and ſo alſo their gifts and grants; yea, it was then held, that the huſband of the wife executrix may give goods, or make releaſe of debt, at his pleaſure. But doubtleſs by marrige neither are the goods, (though perſonal) which the wife hath as executor deveſted out of her, and ſettled in her huſband, as her own goods are; nor, if ſhe die, ſhall they accrue to the huſband, if no alteration were of the property, but ſhall go to her executor, or to the next of kin, being adminiſtrator of her teſtator, if ſhe have no executor: and ſo was it held in the firſt year of Queen *Mary*. Yea, though for any other goods which the wife had in her own right before marrying, the huſband alone, without naming the wife, may maintain an action of treſpaſs: yet touching ſuch goods as the wife hath as executor, the action muſt be brought in the names of the huſband and wife, to the end that the damages thereby recovered may accrue to her as executor in lieu of the goods. So alſo muſt the replevin for thoſe goods be in both their names. But although the huſband be thus named with the wife, yet principally is it the ſuit of the wife; and therefore in ſuch actions, or in debt by huſband and wife, ſhe being executor, if it come

33 H. 5, 31.

M. 31 El. in Com. Ban. If the huſband be to avow, it muſt be in the right, of his wife, executor or ad-

to

to trial by jury, the husband being an alien, yet shall he not have trial *per medietatem linguæ*, or *alienigenarum*, that is, by half aliens, as in other cases where an alien is party to a suit is to be had. And where, to a wife made executor, power is given to sell land of the testator's, she may sell to her own husband, as was resolved in the time of K. *Hen.* the seventh, where the feoffees (it being land settled in use) were committed to the *Fleet*, for that they would not execute an estate to the husband according to the wife's estate. But of this I much marvel, since the law intends the wife so under the husband's command and subjection, that it holds not her disposition of land to him by *will* free, nor therefore of force; and how shall this then be conceived to be but a partial sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a woman under coverture, doth in a manner subject it voluntarily to the husband's will. And it hath been held by some, that even an infant's or feme-covert's conveyance in such case of necessity should stand firm and unavoidable, because of the condition express or implied, that the state should be void if no such conveyance made.

ministrator, Manfield's case. Doctor julier his case.

10 H. 7. 20.

Bro. Just. Cui in vita 15 she may sell to any other, but not to him.

Fenner Just in Ban Re.. Pasc. 27 El. & 34 E. 3. Bro. cui in vita 15. No prejudice to them, that it be good.

Feme-covert put out money in name of another, but for her own use, he whose name it was put out in, is but a trustee: yet in law it is his money, and the wife hath no remedy for it but in a court of equity. Therefore the husband shall not have it as husband, but he may have it as administrator, *March.* 44.

CHAP. XVIII.

Touching infants, and their making or being made executors.

BEing now to consider of disability by age, for want of years in persons making or being made executors; let us first take a view of the several ages of men and women, to several purposes material in the law, judgment, and respect. And first, touching a woman: *Wangford*, in *Henry* the sixth his time shews, and other books approve, that she hath six several ages respected in, and by the law. As first, the age of seven years for her father to have aid of his tenants to marry her. Next, nine years, to deserve dower, that is, that in case she be of that age at the time of her husband's death, she shall be endowed: but not if she be any thing under those years; the law being physically informed, that a woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the parliament in the late Queen's time, when it was made felony to have unlawful carnal knowledge of any woman child under the age of ten years, it being then conceived, as I think, that no such could consent. The age of twelve years is a woman's time for assenting or dissenting to marriage, in more tender years, had. For so it appears by divers books; although Mr. *Littleton* hath here no distinction between male and female. The age of fourteen years is a woman's time

35 H. 6. 41. b.

1.

2.

18 Eliz. c. 7.

3.

4.

time to be in wardſhip, or not; ſo as if ſhe be any thing above thoſe years at the time of her anceſtors death, ſhe eſcapeth wardſhip. The age of ſixteen years is her time of coming out of wardſhip, being once fallen under it: for although had ſhe been full fourteen, ſhe had eſcaped it, yet not ſo being at the time of her anceſtors death, her wardſhip laſteth till ſixteen years, except the Lord ſhall ſooner marry her. And laſtly, the full age of a woman, whereby ſhe is enabled firmly and unavoidably to make grants or conveyances, is twenty one years, as well as for the male; before which time, be it that ſhe being ſole make a feoffment or other conveyance, or being married alien her land by fine, and her huſband of full age join with her, yet is it *infirm* and *avoidable*. 5. 6.

Now of the male, or man, the firſt age material, and ſettledly reſolved on, is twelve years; for at that time each male is at the leet, to ſwear his fidelity to the King. This, women do not, and therefore are they never ſaid to be outlawed, but to be waved, becauſe they have not this admittance into the law which males have. This hath been, as I think, the ground of that ſpeech, that *women are lawleſs creatures*. 1.

The ſecond age of males is 14 years, accounted by the law the age of diſcretion eſpecially material to two purpoſes, *viz.* Firſt, that if one under that age commit an act amounting to felony, yet is he to ſtand free from the attainder and puniſhment incident to a felon. Regularly it is thus, but, *Non eſt regula quin fallat*. One of much leſs years, having attained ripeneſs of diſcretion and diſcerning, ſhall incur the like attainder as one of full age: as was reſolved in 2.

3 H. 7. f. 1. b. the time of K. *Henry* the ſeventh, touching an infant but of the age of nine years, who having killed another boy of the like age with his knife, and then hiding the ſlain boy, and excuſing the blood found upon him by ſaying that his noſe had bled; it was held by the judges, that he was to be hanged as a felon, his ſuch non-age notwithſtanding. The other point, touching which this age of fourteen years is eſpecially material, is touching an heir of lands held by ſocage: for in caſe ſuch heir be under that age, he is to be in ward to the next kin; but if he be of that age, he is not to be in ward at all, for that the law judgeth him to be of diſcretion at thoſe years: and therefore a guardian in ſocage being in effect but a bailiff accountable, he hath no need of ſuch an one, other than ſuch as himſelf ſhall chuſe.

3. The third age in and touching males material is fifteen years: for every lord of a manor or one having freeholders in ſocage, or by knight's ſervice, when his eldeſt ſon cometh to that age, *viz.* fifteen years, is to have of them aid for the making of him a knight, towards which every one holding by a whole knight's fee is to pay twenty ſhillings, and ſo ratably for more, more, and leſs, leſs; and each holding twenty pound's land in ſocage is to pay the like ſum, and ſo ratably for more or leſs.

4. The fourth age of males is the full age of twenty-one years, which maketh him free from wardſhip, having lands held by knight's ſervice deſcended unto him, and alſo makes him able to alien lands or goods makes firm his bonds, ſtatutes recognizances, *&c.* For although at fourteen the law judges him of diſcretion, yet doth

doth it not hold him fully ripe till one and twenty.

The laſt age of males reſpected by the law is ſeventy years: at which time ſheriffs are to forbear to impanel them in juries; and in caſe they do not, ſuch old man may have a writ to the ſheriff grounded upon the ſtatute to that purpoſe made in the time of K. *Edw.* 1. commanding ſuch ſheriff to forbear the impannelling of him, and he may have an action to recover damages upon that ſtatute. This is called by moſt *a writ of Dotage*; a word, perhaps anciently taken in good and favourable ſenſe, *pro dote ætatis, viz.* a gift, privilege or exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of the ſeveral ages, let us now ſee wherein and how age is material touching them who are to make, or to be made executors, and what age is required thereabout. Maſter *Perkins* ſaith, that one of four years old may make a *will* and conſequently executors; and his reaſon is, becauſe the executors being to account before the ordinary, it cannot be intended but that the goods ſhall be diſtributed for the good of his ſoul. He ſpeaks as if he only made an executor by his *will*, but did not bequeath any thing, but left all to the executor's conſcience and diſcretion, which is not uſual, though feaſible, as before I have ſhewed, or ſaid at leaſt. But admit it were ſo, and no bequeſt at all contained in the *will*; yet ſince at that age an infant hath no diſcretion to elect a fit perſon to diſtribute his goods, money and other things, nor to make continuation of an executorſhip to another, to whom perhaps the infant was

5. Oblitum. Another of 60. to extempt from being compelled to ſerve by the ſtat. of laborers. 23. c. 1. W. 2. cap. 3. 13 E. 1. No. Na. Br. 165.

Deviſes f. 97. No good reaſon, for one may make an ill account, eſpecially having a child's direction for his doings.

executor; I cannot ſee that his *will* ſhould be of any force: but if he be of the age of 14 years, being the age of diſcretion in the judgment of law, then I ſhould hold him able to make a *will*, although yet he be an infant till 21 years, and can make no gift of land nor goods which ſhall be of force. And *Babington* chief juſtice, to other purpoſe, makes like diſtinction between an infant of ſuch tender years, and one come to the years of diſcretion. So alſo, as before we ſhewed, it is in the caſe of felony. And that way alſo ſounds that which *Hank.* ſays in *Henry* the fourth his time, *viz.* that an infant of 18 years old may be a diſſeiſor; as implying that his years may be ſo tender, that, as *Candiſh* ſaith of an infant in *Ed.* the third his time, he is not to be intended able to know or diſcern between good and evil: methinks therefore he ſhould be at the leaſt of the age of diſcretion, *viz.* 14 years, who ſhould be able to make a *will*, and conſequently an executor. And the cuſtom for an infant of fifteen years old to bequeath by *will* hath, as to me it ſeems, affinity with this opinion, though there the caſe was of land in a borough deviſable by cuſtom. And that way reflecteth the caſe in the time of King *Henry* the ſixth, where it was ſaid, that an infant under fifteen years of age ſhould not wage his law, *viz.* take an oath to acquit himſelf of a debt, or excuſe his default in an action real. And farther reaſon of this opinion will ariſe out of the conſideration of an infant made an executor.

Vide poſt. Sup. p. 8, 27.

9 H. 6. f. 6.

2 H. 4. 22.

40 E. 3. 44.

37 H. 6. 5.

21 H. 6. f. 47. 6.

Action againſt defendant adminiſtrator during the minority of A. and the plaintiff ſhews

Now touching an infant made executor, how young ſoever he be, the making of him ſo is not void; but yet the execution of the *will*, which

which is the performance of the office of an executor, ſhall not be committed to him till he come to the age of ſeventeen years, by the law ſpiritual, and till then (for that he is not able to do the part of an executor) adminiſtration is to be committed to ſome other: yet if it be a woman infant who is ſo made executrix, in caſe ſhe be married to a man of ſeventeen years old or more, now is it as if ſhe were of that age, and her huſband ſhall have the execution of the *will*; and if adminſtration were before committed during the minority of the woman, it ſhall now ceaſe, as is ſaid in *Prince*'s caſe. Yet I do a little marvel at theſe opinions, conſidering that theſe things are managed in the ſpiritual court, and by that law; and it intermeddles not with the huſband in the wife's caſe: now by that law, and not our common law, comes in this limit of 17 years. And I have ſeen it otherwiſe reported in and touching the laſt point.

that the ſaid A. at the time of the writ brought was and is under the age of 21 years, and verdict pro quer. Judgment arreſted for the adminiſtration ceaſeth at 17, and ſo doth the action againſt the adminiſtrator. 2 Brownl. 247. Brownhead and Spencer. Co. Lib. 5. fo. 29. b.

M. 41. & 42 El.

Farther touching infants executors, and under the age of ſeventeen years, this is to be noted, *viz.* that ſuch an one is not able as an executor to aſſent to a legacy, ſo as it may by virtue thereof ſettle in the legatee. Alſo if adminiſtration be during ſuch minority committed with ſpecial words of reſtraint or limitation, *viz.* that it is done to the uſe or profit of the infant executor, then no ſale of leaſe or goods, or aſſent to legacy, by ſuch adminiſtrator, will bind or prejudice the infant-executor; otherwiſe, perhaps, if the adminiſtration during the minority be committed generally. And if the teſtator himſelf, making an infant executor, doth alſo appoint another to be his executor during his nonage, expreſſing it to be only for the be-

Co l. 5. f. 22. But payment is to be made to the executor, and not to the adminiſtrator, M. 15 & 16 El. in Com. Bank. Rep. p. 67. Co. l. 5. f. 29.

Co. l. 6. f. 672.

nefit and behoof of the infant-executor; I doubt whether this temporary executor ſtand any whit reſtrained from what pertains to the power of an abſolute executor: for there may be, perhaps, difference between him to whom the owner of the goods commits the government of them, though but for a time and in ſpecial manner, and an adminiſtrator ſo eſpecially made by the ordinary, another being preſently by the *will* of the owner or teſtator to have the adminiſtration, in whom for a time legal defect is found. But now let us paſs over this age of ſeventeen, and conſider of the infant between that time of his being admitted to take upon him the executorſhip, and his accompliſhment of his full age of one and twenty. Firſt then, ſuppoſe that he doth releaſe a debt due to his teſtator; whether ſhall this be good to bind him, and to diſcharge the debtor, as well as if the executor had been of full age, he now having proved the *will*, and being by the law ſpiritual approved an executor able? And this point coming in queſtion in *Ruſſel*'s caſe in the late Queen's time, conſideration was had of divers good reaſons for enabling of this releaſe † (H. 26 El.); as that an executor repreſents the perſon of his teſtator, and in his right and power doth theſe acts and not in his own, and therefore his infancy, which is a ſtate or condition of his own natural perſon, ſhall no

† Debt on bond to teſtator, defendant pleads a releaſe by one of the plaintiffs (executors), plaintiffs reply the releaſe was without conſ. and he who releaſed was within age at the time of releaſe made; and on demurrer it was adjudged for plaintiffs, that it was a void releaſe. *Cro. El.* 671. *Knot v. Barlow, Paſ.* 40 *El. in C. B.*

more

more diſable him than it doth the king, a *mayor*, or other head of a corporation. Alſo divers books were found to run that way, as well in the caſe of an infant, as of a feme-covert. But upon great deliberation in the *King's Bench*, and upon conference had with the Lord *Anderſon*, *Manwood*, and other juſtices, it was reſolved and adjudged, that the releaſe of an infant executor, without payment of the debt and duty, would not bind or bar him. 1. For that if it ſhould, it would be a waſting or devaſting of the goods of his teſtator, and ſo would charge his own goods. 2. It would be a wrong, which an infant could not do by his releaſe. 3. It was no purſuit nor performance of the office or duty of an executor, but the contrary. And upon this judgment a writ of error was brought in the *Exchequer-Chamber*, where it was agreed by all, that the releaſe was not effectual nor binding, ſo as this point now had the reſolution of all the judges of *England*. But it was agreed, that if payment or ſatisfaction had been made, then the infant-executor might have made a good acquittance and diſcharge; and indeed, payment itſelf, if proved, brings diſcharge enough, except in the caſe of a ſingle bill. Note, that the principal caſe adjudged was not a releaſe of any debt or duty by ſpecialty, but of treſpaſs in converſion of goods found or taken in the teſtator's life-time. But *Poſito* that this infant had aſſented to a legacy, whether will this bind him or not? For in the caſe of *Ruſſel* it is ſaid, that, all things which an infant doth according to the office and duty of an executor will ſtand firm; now it is part of his office to pay and execute legacies. Yet ſince this act amounts

16 H. 6. 45, 21. E. 3. 25.

Co. l. 5. f. 27.

amounts to a vaſtation or waſting of the teſtator's good's as well as the other, in caſe there remain not goods ſufficient for payment of the debts, and conſequently here, as well as in the other caſe, the infant's own goods would become liable to his teſtator's debts, I doubt, and incline, that it is not, nor can ſtand effectual: for except in the other we admit a want, or poſſibility of want of *Aſſets* or goods, the releaſe could neither hurt the infant himſelf, nor do wrong to any other; and that admitted, this caſe is of like prejudice. Yet if theſe *Aſſets* ſhould be void, ſo alſo would be his payment of legacies: and how then were he an able executor at the age of ſeventeen years, to ſue and to be ſued for debts and legacies? And if upon ſuit it cannot be ſhewed that debts will take up all, or diſable the payment, then, haply, he may be forced to pay. *Quære*, notwithſtanding, whether theſe acts (though voluntary) ſtand not good upon *Bene eſſe*, or conditionally, *viz.* if there be beſides goods ſufficient, *&c.* or that elſe the non-aged executor may have an action of accompt for the money by him paid to the legatee, and alſo avoid his aſſent, where that is only needful. But doubtleſs, neither the aſſent of ſuch executor before the age of 17, nor any payment of a debt to him, could be good, although ſuch acts to or by another executor before the proving of the *will* would ſtand firm and good; for this infant wants not only proving, but alſo ability to prove his teſtator's *will*; yea, the *will* ſtands ſuſpended, and the teſtator as it were inteſtate, whilſt the adminiſtration ſtands in force, ſo as during that time nothing can be done by any as executor: and therefore there

there is great difference between the caſes. What if payment of a legacy be made to an infant, can he make a ſufficient acquittance? This, I confeſs, is beſides the point in hand; yet becauſe it concerns infants and executors (though not infant-executors) it is not amiſs here to caſt ſome thoughts and words upon the point, for that it many times perplexeth both executors and legatees. Firſt, therefore, in caſe the infant be of the years of diſcretion, *viz.* 14, I hold it clear, that any payment to him made will ſtand good, for that the law at that age holds him able to govern and manage his own lands held in ſocage, and conſequently to receive the rents thereof: wherefore, whether he who makes ſuch payment have any acquittance or not, if he have proof of the payment, he is well enough acquitted from any ſecond payment; and if without payment he get an acquittance, it will not ſuffice, the infancy of him who makes the acquittance conſidered. Beſides, if the acquittance be, as moſt uſually they are, but ſigned only with the name of the maker, and not ſealed, it is only an evidence or proof of payment, and no pleadable acquittance, becauſe no deed; ſo as it nothing differs from proof by witneſſes, ſave that it is not mortal, as they. But now if the infant be under the years of diſcretion, what ſhall we ſay to a payment to him, eſpecially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be uſed by the executor generally; and the ſureſt way is, if he fear to keep it in any reſpects, to pay it into the court where it is recoverable, *viz.* where the *will* was proved: yet the caſe ſo may be, as that this payment may not be at all ſafe for the

Notes of receipts, called acquittances.

Vide Stat 4, 5. Annæ cap. 16.

executor. As put the caſe that he entred into bond or ſtatute, to pay all legacies by ſuch a day to the ſeveral legatees; here, I think, the payment into the court ſpiritual ſufficeth not, for that muſt make the receipt to be with ſome charge, which is in ſome kind an abatement, there I think therefore, legally to ſecure the executor, the payment muſt be to or in the preſence of the guardian, becauſe of nutriture, *viz.* him or her who hath (though not as guardian in reſpect of lands) the cuſtody or education of the infant; for otherwiſe, to pay it into the hands of ſuch a tender infant, ſeparate from any governor or guardian, were to expoſe it to loſs, both for that he is not able to count the ſum, and for that he, yet not being come to diſcerning years were alike with *Æſop*'s Cock, to part with pearls or coin for plums and trifles of no value. But in caſe no bond nor other collateral penalty lie upon the executor, or in caſe the bond or ſtatute be only to perform the *will* generally, which nothing alters the courſe of payment which by the *will* the law lays upon executors; then is not the executor put to any ſuch payment, nor need pay without demand and acquittance, as in caſe of payment upon a ſingle bill, or of rentſeck, where no diſtreſs can be taken, nor other penalty incurred. Yet in that caſe, if demand be, and acquittance ready to be given, let the executor take heed, in caſe he be bound to performance, that he ſtand not upon the invalidity of the acquittance in reſpect of non-age; for, as I have ſaid, proof by witneſſes may ſupply a nullity of acquittance, and much more the weakneſs or imbecility; payment according to the teſtator's appointment being

being the matter which acquitteth the payer, and this the executor may have teſtified under the hands of divers witneſſes expreſſing circumſtances, ſo as all dying he may continue ſafe from ſecond payment as well as if an acquittance had, the witneſſes whereunto are ſubject to mortality as well as the other. But herein courts of equity do often interpoſe helpfully for them who ſeek not evaſion from payment, but only ſecurity in paying. And of infant-executors, and by occaſion thereof, of infancy in legators or legatees, thus much.

An infant-executor cannot ſue *per Attornatum*, becauſe he cannot make a warrant of attorney. But if one executor be of full age, he may ſue with that other *per Attornatum*. 1 *Lev.* 299.

CHAP. XIX.

Of legacies.

ALthough theſe be not recoverable at and by the common law, but moſt naturally at and by the law eccleſiaſtical; yet by ſuits in courts of equity, as the *Chancery* and *Courts of Requeſts*, they are often obtained, and of many things touching them common law taketh notice, and hath manifold occaſions ſo to do. We will therefore conſider thereabout theſe parts or points, ſome whereof have been in part before touched upon other occaſions.

1. Whether any legacy in certain, lying in prender, may be taken or had, without the executor's

ecutor's aſſent by the legatee, or him to whom it is bequeathed.

2. When an executor can or ſafely may pay, deliver or aſſent to a legacy.

3. Whether one executor alone may do it; and what if the executor be an infant, or woman-covert.

4. What ſhall amount to an aſſent of the executor, and what to diſaſſent or diſablement of aſſent.

5. How a leaſe or chattel real may be given to one for a time, with remainder to another; how not.

6. Where an aſſent to the firſt, or one part of the bequeſt, ſhall imply or amount to an aſſent for the reſidue.

7. Of the manner of aſſents, and therein of aſſents conditional.

8. What manner of intereſt he in the remainder of a leaſe after the death of another hath during the life of that other: and whether he may diſpoſe of it during that time, and how.

9. Whether this remainder can be defeated by any act of the deviſee for life, or by the death of him in remainder firſt.

10. By what acts or accidents a legacy may be forfeited or loſt, and therein of revocation, death before, *&c.*

11. Whether the executor's aſſent ſhall have relation to the teſtator's death, and ſhall make good a grant before made by the legatee.

If the executor give it to another, the legatee hath no remedy at the common law, per Priſot. 37 H. 6. 30.

As for the firſt, we have before ſhewed the aſſent of the executor to be neceſſary before any legacy can be had, for that debts are firſt to be paid, and that the executor is to look to, at his peril. But hereto add a little out of M. *Swinborn*,

borne, a learned civilian, who ſaith, that incaſe any goods be in the hands or cuſtody of *J. S.* and the owner doth bequeath them to him, then may he keep or retain them againſt the *will* of the executor, ſo as there be other ſufficient goods in the hands of the executor for payment of all debts: but though thus (as it ſeems) it would ſtand in the eccleſiaſtical law, yet for that no property is transferred to the legatee without the executor's aſſent, therefore, doubtleſs, the executor may at the common law recover the thing with-held, or damages to the value, againſt the legatee detaining it. Another caſe there is, wherein, as the learned civilian ſaith, the legatee may take to him the thing bequeathed lying in prender, *viz.* Horſe, other beaſt, or piece of plate, or other like thing known, and in being and that is, where the teſtator doth expreſly ſo appoint by his *will*. But herein, doubtleſs, the common law, at and by which debts are recoverable againſt executors, will oppoſe the law ſpiritual: for elſe by ſuch appointment the teſtator might cauſe all his goods to be taken by legatees, and that none ſhould remain to pay debts. Yet if there be other goods beſides ſufficient for payment of debts; then indeed I ſee not how the executor can hinder ſuch taking, without violating his oath taken for performance of the *will*. If any ſay, that it is alſo a breach of oath in the other caſe; I ſay, he obſerveth not that [there] that clauſe in the *will*, being againſt the law, is void, and conſequently, there is a nullity upon it, and it is as if no ſuch thing were in the *will*, and ſo the oath extendss not to it. And as a chattle ſhall not be transferred to a ſtranger with-

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out the executor's aſſent; ſo if the deviſe be to the executor himſelf till he elect to take as legatee, it ſhall be to him as executor, as appears by the ſtrain and argument of two caſes in *Plowd. Comment.* And more lately in the *King's Bench*, the point being divers days argued, was at laſt ſo reſolved by three judges againſt one. And the reaſon of *Coke* at the bar was very good, for here the executor ſuſtains two perſons, *viz.* an executor and legatee, and ſo all one as where the bequeſt is to another; for, *Quando duo jura concurrunt in una perſona, æquum eſt ut ſi eſſent in diverſis.*

Welchden & Elkington Paramour & Yardly, Portman & Simmes caſe, Trin. 37 El. All but Gaudy ſo agreed.

As for the ſecond point, it may have theſe two parts: firſt, when the executor is able to give ſuch aſſent to a legacy: And, ſecondly, when he may do it with ſafety. As for the firſt, he is able before probate of the *will* to aſſent unto the execution of a legacy, as elſewhere is ſhewed, and that although he be not of full age of one and twenty years: but if he be under ſeventeen years, ſo as he is not able to take upon him the office of an executor, and therefore adminiſtration is during that time to be committed to ſome other; here his aſſent is not of force or effectual, as we find in *Prince*'s caſe, to have been held in the caſe of *Pigot* and *Gaſcoin*. As for the ſecond part, till all debts be payed, the executor may not ſafely conſent to put the legatee into the leaſe or chattel deviſed; no more than he may pay money bequeathed, if there be not ſufficient alſo to pay all debts. Of theſe things more is ſaid elſewhere. Yet becauſe the reader, or he that deſires direction in theſe points, will look for them under this title,

21 El. Dyer 367.

Co. l. 3 f. 29.

tle, I thought not good here to be altogether silent touching them.

As to the third point, *viz.* Whether the assent of one executor, where there be many, be sufficient; I see not how to doubt: since any one executor may give away any goods of the testator's, or release any debts due to him, therefore much more assent; which is no more or greater work, in effect, than an attornment of one lessee upon a grant of a reversion. And if there want to pay debts, he only who assented shall answer for it of his own goods and not his companions. But if this executor be either under the age of seventeen years, or under coverture, *viz.* a woman married, such is not able to give a good assent to bind the others, no nor themselves, for then thereby the infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husband's assent is sufficient where the wife is executrix; for his act, whom she hath chosen to be her head, may prejudice as well her as himself; yea, though she were within age, yet he being of full age, his assent will stand good. But if he or another executor in his own right be above seventeen years of age, or else under twenty-one, I doubt whether now his assent will be sufficient at least, except the case be put, that there be *Assets* sufficient, which perhaps there may be material, though not in the other. See more hereof after in the title of women-covert and infants executors.

6 H. 7. 5. If the bequest be to one of the executors, he may take it without assent of his companions; yet if a debt, his companion may release. H. 48 E. 4. 14, 15. So held where but one of the executors during non-age assented in the case of Rhetorick and Chappel. H. 9 Jacob. Rot 87. in Ban. Reg.

As to the fourth point: first, there may be an assent and election implied as well as express:

for if in the deviſe or bequeſt the legatee be appointed to do ſome act as in reſpect of the legacy and the executor doth accept the performance thereof, this amounteth to an aſſent. So if the deviſe be to an executor for the education of ſome children, which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as executor, as appears by the caſe of *Paramour* and *Yardley*, *Plowd.* 543. So if an horſe be bequeathed, and one offering to buy him of the executor himſelf, he directeth him to go and buy the horſe of the legatee, or if the executor himſelf offer money to the legatee for the horſe; this implieth an aſſent that it ſhould be the legatee's by the *will*: and ſo was it held in the caſe between *Low* and *Carter*, where the deviſee of a term did grant it to the executor; and this acceptance of a grant from him was held to imply the executor's aſſent, that it ſhould be his to grant. But I ſee not well how that ſhould be law which in the later part of the L. *Dyer* is found, *viz.* Where a term was deviſed to *J. S.* and he was made executor, and after the death of the teſtator entered and occupied the lands a whole year without proving the *will*, that this was an election to have it as deviſee, and not as executor. For, firſt, he had good right to the term as executor before probate, and ſo might clearly in that right have taken the profits, although it had not been deviſed or bequeathed to him, and that before any *will* proved. Secondly, He could not by right have it as legatee, without aſſent of himſelf or ſome other as executor. Therefore this general acceptation can determine no election. as elſe-

In the ſpecial verdict in Manning's caſe, the firſt deviſee, Eadem Maria dixit, quod ſi ipſa obiret tunc, præd. Matheas, (viz. the remainder man and adminiſtrator after her death, de bonis non, for ſhe was executrix) haberet firmam & molendin. præd. Vide 8 Co. 94. Manning's caſe.

See Co. Lib. Intr. 150. the executor being deviſee for life, ſaid the other ſhould have it after her death; and he entered, and took adminiſtration, ſhe dying inteſtate, yet held Aſſets in him. This M. 19 H. 7. Rot. 318. See Lib. Inter. 321.

One gave the third part of his goods to A. with whom the executor accounted for the amount, and A. ſued for that ſum in debt; but no judgment upon demurrer. Tr. 37 El. in B. R.

Where bequeſts to the executor himſelf.

Tr. 37 Eliz. If he by *will* bequeath it to J. S. this is an election to have it as legatee.

where is held. As for diſ-aſſent or diſabiement to aſſent: as if the executor do once declare his aſſent that the legatee ſhall have his legacy, he may then enter into it or take it, notwithſtanding the executor's countermand or revocation of his aſſent after; ſo, on the other ſide, I think, if he fully and expreſly deny that the legacy ſhall take effect, he cannot after make a good aſſent thereunto, for that election once made muſt ſtand peremptory, be it refuſal to aſſent, or aſſent. Yet *Quære* of this, for that the refuſal to aſſent may be checked by ſentence or decree in the ſpiritual court or court of equity, and ſo an aſſent be enforced. But if the power of aſſenting be legally loſt by the means aforeſaid, *viz.* diſabled, I ſee not how any legal intereſt can be transferred by that compelled aſſent, howſoever decreed. And what is ſaid of a legacy bequeathed to another, the ſame may be underſtood in caſe where the bequeſt is to the executor himſelf, and he makes his election to have it as legatee, or as executor. But if where an horſe is bequeathed to *A.* the executor after the teſtator's death doth ride the horſe, or uſe him in the coach or in the plough, I do not take this to be any ſuch diſagreement to the execution of the legacy, as that the executor cannot after aſſent to the legatee's having thereof, no more (though it be ſomewhat more) than where a drinking-cup is bequeathed, and the executor after the teſtator's death doth uſe it to drink in: nay, if a leaſe of land be bequeathed to *A.* and the executor continueth the depaſturing of the teſtator's cattle therein; yet is not this any diſagreement to the execution of the legacy. But if this leaſe-land were let out by

So if the executor take a new leaſe, his aſſent after is void. Tr. 37 El. z. Carter's caſe, 19 El. Dy. 359.

the teſtator from year to year, and the executor diſchargeth the tenant, and taketh it into his hands at the year's end; this I conceive to be a diſ-aſſent to the legacy: and ſo alſo perhaps may his taking or diſtraining for any rent thereupon due after the teſtator's death. Yet am I not reſolute that the diſ-aſſent is ſo peremptory and unchangeable as the aſſent, remembring the caſe in K. *Henry* the eighth his time, where a term being granted by a leſſee conditionally, ſo as the aſſent of the leſſor could be had by ſuch a day; though the leſſor's aſſent were at one time denied, yet might it be yielded at another, ſo as it were at any time before the day. But yet there it was held, that if no time of aſſent were limited, then one expreſs denial or refuſal would be peremptory, ſo as the refuſal were expreſſed to the party to whom the aſſent was to be given, otherwiſe, if it were but in ſpeech to or amongſt ſtrangers. This and the former caſe, 19 *Eliz.* give the beſt light to this point that I remember. Now for diſablement to aſſent, it was held in the forementioned caſe of *Low* and *Carter*, that where a term is bequeathed to *A.* and after the teſtator's death the executor takes a new leaſe of the ſame land for more years in poſſeſſion, or to begin preſently; now by this was the term left by the teſtator ſurrendered and drowned, ſo as it could not paſs to *A.* by the executor's aſſent after.

14 H. 8. 23.

Dy. 359. After choice once made, no variation.

As to the fifth point, *viz.* in what manner a leaſe for years or other chattel real may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a leaſe for years was bequeathed to one for life, or for ſo many years as he ſhould live,

live, whether the limiting of a remainder thereof after his deceaſe were of any validity in law or not. And this doubt had this ground: any eſtate for life in the judgment of law is greater than any term for years: therefore when a termor hath by his will given his term, or his houſe or land which he ſo holdeth for years to one for life, or for ſo many years as he ſhall live; this teſtator and deviſor hath not in the judgment of the law any eſtate remaining in him: and therefore it was thought very hard for him to give or limit a remainder to another. But after many arguings and debatings, it was in the late Queen's time reſolved, that ſuch a remainder was good; and that if the firſt deviſee died before the term expired, that then he to whom the remainder was limited might enter and enjoy the reſidue of the term. As for the giving of part of the years to one, and the reſidue to the other; *viz* if the term being twenty years, the leſſee bequeathed ten thereof to his wife, and the remainder to his daughter; of this no doubt ever was but that it was good: for that after the firſt ſtate limited, there remained a farther term, *viz.* ten years more in the deviſor, whereof he had power to diſpoſe; whereas in the other caſe, after the term limited to one for life, there remained but a poſſibility that this life ſhould not take up the whole Term. But now, put we the caſe a third way, *viz.* that the termor deviſeth or bequeatheth the thing in leaſe to one child in tail, with remainder to another, and dieth, and the firſt entereth and dieth without iſſue; now whether ſhall the next in remainder, or the executor of him ſo dying have the term reſidue? And this caſe came in queſtion, and Plow. Com. 520 & 522.

was adjudged about the middle of King *James* his reign in the *Exchequer:* for there, Maſter *Hamond* holding by leaſe for years from the crown the manor of *Akers* in *Kent*, deviſed the ſame by his *will* to *Alexander Hamond*, his eldeſt ſon, and the heirs males of his body, with remaindeer to *Ralph Hamond*, another ſon, in like manner, and the like remainder to *Thomas Hamond*, and made the ſaid *Alexander* executor, who after his father's deceaſe elected to take as legatee, and after *Ralph Hamond* died, leaving iſſue male, and making his wife executrix: *Alexander*, not having iſſue male granted the whole term by deed to *B.* and *C.* for the behoof of himſelf and his wife during their lives, and after to the uſe of his youngeſt daughter, whom Sir *Robert Lewkener* married. Then *Alexander* dying without iſſue male, the wife and executrix of *Ralph Hamond* entred, claiming the term, and being kept out, ſealed a leaſe; whereupon an *Eject. firmæ* was brought, and the jury appearing at the bar in the *Exchequer* found a ſpecial verdict in effect *ut ſupra.* And in argument of this caſe, firſt the main queſtion was, whether the caſe were all one in law with the former, where a term was deviſed to one for life, with remainder over, ſo as by the death of *Alexander Hamond* without iſſue male the term ſhould go to the next in remainder, as in the other caſe, by the death of the deviſee for life, dying within the term, it ſhould do? And on the plaintiff's part it was urged to be all one, ſo that by virtue of the bequeſts *ſupra*, *Alexander* had an eſtate to him and his executors only ſo long as there ſhould be heirs-males of his body; and he dying without ſuch iſſue, the term remained to the executors

Both Alexander and Ralph were executors; but that makes no difference.

Executors of *Ralph*, who had the remainder in like manner, and left iſſue male, which ſtill lived, and ſo that ſtate of *Ralph* yet had continuance. For it was admitted by the counſel on that ſide, that the term could not go to the iſſue male of *Ralph* according to the words and intent of the *will*, ſince it was impoſſible to make a term to deſcend without an act of parliament. This therefore they ſaid the law ſhould work, which was neareſt to the intent, *viz.* that after *Alexander*'s death it ſhould go firſt to his executors and aſſigns, ſo long as iſſue male of his body doth continue; and for want of ſuch iſſue, then to *Ralph*, his executors and aſſigns, ſo long as his iſſue male ſhould laſt: and therefore in this caſe, the iſſue male of *Alexander* failing, the executor of *Ralph*, whoſe iſſue male faileth not, ſhould enjoy the term; and ſo judgment ought to be given for the plaintiff being leſſee of that executor. On the other ſide it was ſaid by the defendant's council, that this caſe differeth much from the other caſe, where the term or land held by leaſe is given but for life to the firſt, with remainder to another; which caſe, as having been often reſolved, was clearly admitted to be good law: for in that caſe the intent of the teſtator might and did take effect. But in this caſe if the land ſhould go to the executors and aſſigns of *Ralph Hamond*, it muſt go againſt the intent of the teſtator, whoſe mind and will was, as it appears by his words, that it ſhould go only to the iſſue male of one ſon after another and not to any executors. Now then, ſince this intent was ſo contrary to the rules of law, that it could not take effect, therefore it muſt be void, and ſo all the words of heirs male ſtand-

ing void, the will is to be conſtrued as a ſole and abſolute gift and bequeſt to the ſaid *Alex.* and conſequently the term muſt go to his executors and aſſigns. And for this point, reſemblance was made to a caſe reſolved in the *King's Bench*; where a leaſe was made by indenture to *A. Habend.* to *A. B.* and *C.* for their lives: now becauſe *B.* and *C.* could take nothing, it was reſolved that *A.* ſhould not have it for their lives, but for his own only. This caſe was ſaid to come very cloſe in reaſon to the caſe in queſtion: for as here the intent of the leaſe was that *B.* and *C.* ſhould be eſtated for their lives, and, ſince that could not be, therefore the naming of them ſhould be utterly void, and as if they had not at all been named, and their lives ſhall not ſtand as a meaſure for the eſtate of *A.* ſo in the other caſe the intent of the *will* being, that the leaſe or land leaſed ſhould go to the heirs-males of the body, firſt of *Alexander*, and after of *Ralph*, ſince this cannot be, therefore the words and name of heirs males ſhould ſtand for a mere blank and cypher, and not to meaſure out any ſtate to the ſaid *Alexander* and *Ralph*, and their executors and aſſigns. Alſo it was ſaid on the defendant's part, that an eſtate for life in the judgment of law is of ſo ſhort and uncertain continuance, that if *A.* make a leaſe to *B.* for his life, and after makes a leaſe of the ſame land to *C.* for years, now ſhall not this later leaſe be void abſolutely for any part of the term, but ſhall ſtand in expectation of the death of *B.* and, as ſoon as he dieth, ſhall take effect immediately: whereas if the leaſe to *B.* had been for ten years, or any like term, then the leaſe to *C.* ſhould have been void for

Windſmore & Holford vel Holborn, M. 28 & 29 El. argued, and Tr. 29 El. adjudg. Windſmore v. Hubbard, Paſ. 29 El. Cro. El. p. 57.

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ſo many years of his term. Thus it appears that a ſtate for life is very momentary in the judgment of law, and not reputed of any certain continuance ſo much as for a day. But it is otherwiſe of an eſtate-tail, ſo that if *A.* having given land to *B.* in tail, doth after (without indenture which makes an eſtopple) make a leaſe to *C.* for 21 years, and then *B.* dieth without iſſue during the term, yet ſhall not the leaſe take effect, becauſe it was utterly void at the firſt making. For an eſtate-tail, being a ſtate of inheritance, may in the intendment and judgment of law have continuance for ever, as appears both by the caſe of *Adams* and *Lambert*, where it is held within the ſtatute of chanteries, which ſpeaks of gifts to have continuance for ever. Therefore a reverſion upon an eſtate-tail is no *Aſſets*, nor giveth cauſe of receipt; otherwiſe in all theſe caſes it is touching a reverſion expectant upon a ſtate for life. Again, it was ſaid by the defendant's council, that an eſtate may be limited to *A.* and his heirs during the life of *B.* with remainder to *C.* as in *Chudley*'s caſe was reſolved: but if land be given to *A.* and his heirs ſo long as *B.* ſhall have heirs of his body or heirs-males, with remainder over to *C.* this remainder is utterly void. So as there is in the judgment of law a great difference between the largeneſs and continuance of an eſtate-tail, and of an eſtate for life. And if (which is worth the obſerving) a fee-ſimple cannot afford a remainder to be drawn out of it after ſuch a gift to one and his heirs, during the continuance of an eſtate tail, or of the meaſure thereof; much leſs can a term yield ſuch large thongs to be cut out of it, as a remainder after an eſtate

28 H. Dy. f. 7. eſtate to one ſo long as he ſhall have heirs of his body, or heirs-males, which is all one. And in this caſe the remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of a contrary opinion, as the Lord *Dyer* ſheweth. Farther it was ſaid, that if ſuch a conveyance by *will* ſhould ſtand good, it would raiſe a perpetuity not to be cut off by any recovery.

But whereas the caſe of *Hamond* hath been related before, ſo as by way of admittance it was argued as a gift and bequeſt to *Alexander Hamond* and the heirs-male of his body, with remainder in like manner to *Ralph*; the truth of the caſe was, that the words of the *will* were only to *Alexander* and his heirs-males, (not ſpeaking of his body) and ſo to *Ralph*; which, as was urged by the defendant's council, made the caſe ſtronger againſt the plaintiffs; for admit that the former way *Alexander* ſhould have had but a ſtate determinable upon the continuance of his iſſue-males, yet here not ſo; ſince the reaſon why in *wills*, ſuch a deviſe being made, the law ſhould ſupply the words (*of his body*) is only to make an eſtate-tail to the iſſues-male, according to the teſtator's intent. Now in this caſe of a term for years ſo bequeathed, no eſtate-tail could poſſibly be, though theſe words had been in the *will*; and therefore the motive to the law failing, no ſuch ſupply will be made by the law, ſince it would be to no purpoſe: conſequently, here was neither ſtate-tail, nor iſſues or heir-males of the body, on whoſe continuance this ſtate of *Alexander* ſhould be determinable. Therefore it was an abſolute and total bequeſt of the term to *Alexander* for ever, *viz.* ſo long as the term ſhould continue; for as a bequeſt

bequeſt to one for ever is as much as a bequeſt to him and his heirs; ſo a bequeſt to one and his heirs is as much as if it had been to him for ever.

And this caſe, after ſix arguments on each ſide at the bar, (if I much miſtake not) was upon argument by the barons adjudged for the defendant by the Lord Chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who only heard, as I take it, one argument on each ſide, made of purpoſe in reſpect of his coming into his place, after the former arguments) being of the contrary opinion: and the judgment proceeded upon the point formerly touched, that, as this caſe was, the ſtate of *Alexander* did not end by his death, and remain to the executors of *Ralph*. Other points were ſtirred, which will be touched upon in other diviſions after, in this chapter. It will be obſerved that I do more fully expreſs reaſons and points enforced on the defendants part than on the plaintiffs, wherefore let theſe two reaſons be accepted. Firſt, that I better could relate *that* than the other, being the firſt who argued for the defendant, and hearing little of that which was by others ſaid on either ſide after, nor hearing the courts; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the defendant's part, to prove that this caſe differeth from the common caſe of deviſe to one for life, with remainder to another.

We are now come to the ſixth point, *viz.* that where houſe or land held by leaſe, or the profits thereof, or the leaſe or term itſelf, which in a *will* makes no difference, is bequeathed to *A.* for life, or for ſome part of the term, with re-

Plow. 545. 6. Co. Lib. 10. f. 47.

remainder to *B.* and the executor aſſents that *A.* ſhall enjoy his bequeſt whether this ſhall enure to *B.* alſo, ſince without the executors aſſent no legacy can take effect. And it hath been reſolved that this aſſent ſhall be effectual as well to all the remainders as to the firſt eſtate: and ſo, according to former reſolutions, it was admitted in *Hamond*'s caſe, that *Alexander* his aſſent to take as legatee ſufficed (if the bequeſt had been good) for the remainder to *Ralph* and others. And the reaſon of this doubtleſs is, becauſe here the particular eſtate and the remainder are all but one eſtate in law; they make but one degree in a writ of entry, nor ſhall have but one year and a day to enter for mortmain. And an attornment to the grantee of a rent or reverſion for life with remainder over doth enure alſo to the remainder, which being aſſent hath much affinity to that of the executor, each tending to perfect the grant of another man. Now then, whereas it was urged in *Hamond*'s caſe, that the ſtate limited to *Ralph* ſhould take effect, not as a remainder, but as a new eſtate to commence futurely, *viz.* when *Alex.* ſhould be dead without iſſue male: if it could be admitted to be ſo, then could not the aſſent of the firſt ſtate to *Alexander* have enured to this, ſince to *R.* in remainder it worketh as being one ſtate with the firſt, which reaſon muſt fail the other way. This difference, between a remainder, and a new eſtate future, brings to my mind the caſe of a rent by way of new creation, granted by *C.* out of land to *A.* for life, or in tail, with remainder to *B.* In like manner it hath probably been held, although this limitation to *B.* cannot be good by way of remainder, becauſe *C.* had no eſtate

eſtate in the rent remaining with him when he made the grant to *A.* yet ſhould it be good by way of a new grant and creation to commence futurely. But this doubtleſs cannot ſo be but with a difference. For if the grant were by indenture between *C.* on the one part, and *A.* only on the other part, now *B* being no party to the deed, can take nothing by it, except by way of remainder, but if he were party to the indenture; or if the grant were by deed-poll, to which all men are alike parties, then it haply may enure as a future grant to *B.* This is not impertinent.

Now as the executor's aſſent to one cannot enure to another, though of the ſame thing, except by way of remainder; ſo neither can it any way where the things are not the ſame, except in very ſpecial caſes. As if a termor bequeath a rent to *A.* and the land itſelf to *B.* the executor's aſſent that *A.* ſhould have the rent is no aſſent that *B.* ſhould have the land: Yet I think the executor's aſſent that *B.* ſhould have the land doth imply the aſſent that *A.* ſhould have the rent. 1. For that the reſtraint impoſed by the law againſt the paſſing of a chattel by a *will* without the executor's aſſent being out of reſpect to the payment of the teſtator's debts, now if the land ſhould paſs to *B.* it is no more available to the teſtator's debts that it paſs diſcharged of the rent, than charged. 2. Since the gift and bequeſt was of the land charged with the rent, therefore if this bequeſt ſhall take effect, it ſhall carry the lands according to the teſtator's intent, *viz.* with this charge upon it: for what elſe doth the executor in this, but aſſent that the *will* of the teſtator herein doth ſtand

Plow. Con. 521. in Bret & Rigden's caſe. So of common or other profit.

ſtand and take effect? and conſequently *B.* muſt take the term according to the *will*, and not in any different or contrary manner.

Next we are to conſider of the manner of aſſents by executors, which hath ſome affinity with the fourth point. But here we ſhall conſider only of aſſents conditional. Now to this purpoſe we will caſt our eyes upon two ſorts of conditions, *viz.* precedent, and ſubſequent. As for the former, an executor may to a legatee abſolutely give aſſent upon a condition precedent, as thus: I am content, that if you can get and bring in to me ſuch a bond wherein the teſtator ſtood bound to *J. S.* that then you enter upon the term, or take the corn or cattle to you bequeathed. So of other like conditions which may precede the aſſent: as, if you can get the aſſent of my executor, or, if you will pay the arrearages of rent to the leſſor behind at the teſtator's death, or, if you will pay the wages already due to the ſervants attending about the cattle or corn to you bequeathed; in this caſe if the condition be not performed, there is no aſſent, and therefore the conditioning in this manner is good. But if it be on a condition ſubſequent, as thus, I do agree that you ſhall have the thing bequeathed to you, provided that you ſhall pay ſo much yearly to me, or to ſuch a creditor of the teſtator; now the legatee entring into or taking the thing bequeathed, ſhall not loſe it again by failing to perform the condition afterwards; for the executor by his aſſent cannot make that legacy conditional which the teſtator gave abſolutely, no more than he can make the bequeſt to be abſolute which the teſtator gave conditionally, except by

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a releaſe made of the condition. As in other things, ſo in this, the executor's aſſent is like to the attornment of a leſſee, which cannot be upon a condition ſubſequent, where the grant is abſolute or without condition, though yet he may to his attornment prefix a condition precedent.

In the eighth place we are, touching the bequeſt of leaſes or chattels real, to conſider what manner of intereſt one to whom a remainder of a term after the death of another is limited hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is clear that he hath but a poſſibility of remainder, for that poſſibly the whole term may be ſpent in the life of the firſt, to whom during his or her life it is bequeathed: now a mere poſſibility is not grantable. There- fore was it reſolved in the late Queen's time, where he in remainder granted or ſold his ſtate or intereſt to another during the time of the firſt, that this grant was utterly void, becauſe a poſſibility cannot be granted. But whereas ſome opinion in that caſe was delivered, that this poſſibility could not be releaſed, no more than granted; it hath ſince been reſolved, that he in the remainder, by his deed of grant or releaſe of the deviſee for life, may make his eſtate, which before was determinable by his death, to be now abſolute, ſo as it ſhall continue to his executors, adminiſtrators and aſſigns, after his death during the whole term. It may be that what was conceived, in the ſaid caſe of *Fulſey*, negatively of the validity of a releaſe by him in the remainder, might be meant, or perhaps expreſſed of a releaſe to him in the reverſion:

9 Eliz. Fulſey's caſe.

Lampet's caſe Co. l. 10. f. 48.

ſion: but ſurely (methinks) though he could not ſurrender, yet his releaſe or defeaſance to him in reverſion or remainder, having the freehold or inheritance, ſhould deſolve or deſtroy this term reſidue after the death of the deviſee for life, ſo as there the freehold ſhould be diſcharged thereof. But *Quære*, for I have not known this in queſtion. As for the other point of *Fulſey*'s caſe, it was in the ſaid later caſe of *Lampet* confirmed and admitted for good law, *viz.* that this poſſibility of remainder could not be aliened nor conveyed to a ſtranger.

Now we are come to the ninth point, *viz.* to examine whether any act of the deviſee for life can fruſtrate or defeat him in the remainder of the term, and whether the act of God, *viz.* by the death of him in the remainder before the firſt deviſee for life, ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man can cut off or defeat the ſecond, though formerly it were held otherwiſe: but according to the late reſolution was it alſo held or admitted by all, in the ſaid caſe of *Hamond*, where was ſuch a grant. And as this cannot be done by any direct grant or alienation, no more can it by an indirect or implied, as by taking of a new leaſe, which is a ſurrender in law of the old leaſe, no more than by an expreſs ſurrender; nor doubtleſs by outlawry, whereby the term of the firſt deviſee is ſettled in the crown. But if we put the caſe farther, of waſte committed by the tenant for life, or breach of condition by not payment of the rent, or otherwiſe; theſe for the whole in the later caſe, and for the part waſted in the former, do ſo deſtroy the leaſe, and put the reverſion

Plow. 322. Welcehden & Elkington. 10 Eliz. Dy. 277. 12 El. D. 359. Co. 8. El. D. 253. & 33 H. 8. Br. Chattels 23.

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in ſtatu quo prius, as that all remainders muſt needs fail: ſo of a feoffment, or other like forfeiture by fine. As for the death of him in remainder, it was urged in the caſe of *Hamond*, that ſince it was but a mere poſſibility, if it could not take effect, and become an eſtate in the life of him to whom it was limited, it could not ſettle in his executor: and to that purpoſe were cited the caſe of the rector of *Chedington*, and more expreſly, as reſolved in the point, the caſe of *Price* and *Atmore*. But the court reſolved, (and found former reſolutions in other courts that way) that the death of him in remainder did not hinder, but that it may ſettle as well in the executors upon the death of the deviſee, as it ſhould have done in himſelf, if he had over-lived the firſt deviſee for life. If the leſſor enter and levy a fine, and the deviſee for life enter not, nor claims in five years; he in the remainder may enter, as having a right futurely accrued.

Lib. 1. 153. Welcken & Elk. ubi ſup. But there the point was never queſtion'd, though ſuch death was there.

In the laſt place we intermedled only with leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken is to be extended to and underſtood of all other chattels real, as wardſhip of body and lands, eſtates by extent upon ſtatutes or judgments, terms, otherwiſe than by leaſe, in fairs, markets, rents, annuities, commons, advowſons, and other profits; yea, one ſingle next avoidance of a church. Now we come to conſider of bequeſts perſonal principally, if not only; *viz.* how ſuch may be forfeited, loſt, or revoked. Firſt then, we will conſider of the acts of the legatee; ſecondly, of the acts of God; thirdly, of the acts of the teſtator. The legatee, as from the civilians I

Of forfeiture, revocation, and other loſs of legacy.

learn, may forfeit his legacy by his miſcarriage towards the *will*: as if he uſes means to have it concealed and kept from being known, and conſequently proved. So if he accuſe it of falſity. So, again, if he deface or deſtroy the *will*. Alſo, if being by the *will* appointed to be tutor or educator of a child, he refuſeth ſo to be. So ſaith maſter *Swinburne*: but *Sylveſter Prierius* ſeems to me oppoſite in that, where he ſaith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non eſt conditionale, ſed modale*; ſo as he takes away the force of a condition from words conditional, whereas the other without words conditional raiſeth a condition implied. Laſtly, if the legatee preſume too far upon the ſtrength of the bequeſt to him, ſo as he taketh the thing bequeathed without the conſent of the executor, thus alſo doth he forfeit his legacy, ſaith Maſter *Swinburne*, unleſs the teſtator did *will* and appoint he ſhould ſo do. The falling into enmity with the teſtator will be conſidered more fitly, as I take it, among the acts of the teſtator. In the next place, let us ſee what acts of God ſhall cauſe a legacy not to take effect. Firſt thus, if the legatee die before the teſtator, this legacy is loſt, and his executor ſhall not have it. So alſo, ſaith Maſter *Swinburne*, if it be appointed to be paid after the death of the executor, and the legatee dieth before the executor, 'tis loſt. And ſo alſo if he die before the condition performed, ſaith he. Let us come now to time of payment, and death

Vide p. Sup. 19.

Swinb. de teſtam. 352, 353. except as tutor or guardian he refuſe.

Sum. Sylv. 283.

De Teſtm. 252.

De Teſtm. 255.

Vide Bro. Deviſe 27 and 45. There were dive s days of payment, and the deviſee die before the laſt; his executor ſhall have it, 14 vel. 2; H. 8. 36. 3. & 3 El D. 59. See this difference. Sum. Sylv. 283. According hereto vide Dy. ubi ſupra per majorem opinionem juſticiar. The executor ſhan't have it till B. would have been 25. 2 Vern. 109. Trin 1728. Laundy and Willie, but if payable with intereſt, qu.

before

before it. If there be a day certain limited for payment, and the legatee die before that day, his executor ſhall have the legacy; contrariwiſe, if the payment were limited to be made when the legatee ſhould be married: but if it were only expreſſed to be towards the marriage of the legatee, and ſhe die before marriage, her executor ſhall have it, ſaith *Swinburne*. Now put the caſe that a legacy is bequeathed to *B.* to be paid when he ſhall be five and twenty years old, and *B.* dieth before that age; it ſhall now be paid to the executor, and that preſently, without ſtaying till *B.* ſhould have been of that age, ſaith *Prierius*. Nay, ſaith *Swinburne*, if the words of the *will* be ſo, *viz.* when he ſhall come to ſuch an age, then if he die before, his executors ſhall not have it at all: but if the bequeſt be general, and farther it be added in the *will*, that the teſtator would have that legacy paid to the legatee at ſuch an age, there though he die before ſuch an age, yet his executors ſhall have the ſum bequeathed. The difference may be ſeen very nice, yet haply it wants not ſome probable colour of reaſon. Now laſtly, let us come to the teſtator's own acts, who clearly hath power to revoke or countermand any legacy, though he revoke not the reſt of the *will*. And here firſt of revocation preſumed. If there fall out *graves inimicitias inter Legantem & Legatarium, Legatum caducum efficitur*, ſaith the ſummiſt; *ſed non propter leves*, ſaith he, *& ſi graves, ſi tamen redeant ad amicitiam, redintegratur Legatum*. That is, by grievous enmity after ariſing, and never reconciled between the teſtator and legatee, the legacy is diſſolved; otherwiſe of a light breach or

Stapleton v. Cheals. Rep. of Caſes in Eq. 76. by C. Baron Gilbert, Hil. 8. Ann. in Canc.

Acts of the teſtator.

Sum. Sylv. 285.

falling out, though it continue until the death of the teſtator. This I conceive to be rather fit for this place, as an act of the teſtator, than to be reckoned or regiſtred amongſt the acts or forfeitures of the legatee; for that it is not by the ſummiſt made material, or any point of difference, whether the legatee gave juſt cauſe of offence, or that the teſtator unjuſtly conceived diſpleaſure, and ſo grew into cauſleſs enmity. Therefore alſo do I hold it of the nature of a revocation implied or preſumed; for that although no revocation be made, yet ſince the teſtator hath ceaſed to bear good will to the legatee, he cannot be intended to will him good, nor conſequently to be of the ſame mind touching the benefiting of him, as he was when he made his will. Yet here again it is worth the conſideration, whether the circumſtance following may not make a difference in the caſe, thus; that where the teſtator dieth ſhortly after the breach and enmity grown, and before he come to the place where his *will* is, or at leaſt to opportunity of peruſing and reforming the ſame, there this very alteration af affection ſhould make an alteration in the *will*, and a revocation of the amicable bequeſt. But where he living a good ſpace after, and coming to the place where his *will* was, and 'ſpecially if he do again peruſe it, he yet doth not croſs nor expunge that bequeſt, here it may be preſumed that either his enmity ceaſed, or that ſo far, as to continue this bequeſt, the charity or other motives inducing him to make it ſtand unvaniſhed and not extinguiſhed by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative *will*, without

without reducing it to writing, and cauſing it to be atteſted by witneſſes, though the teſtator live divers years after, doth ſtronger argue his intent not to continue, that what was done in an extremity ſhould ſtand as his *will*: ſo, on the contrary, the permitting of a bequeſt expreſſed in a written *will* to continue without any croſſing, blotting or defacing, may argue, againſt contrary preſumption, the teſtator's mind, that it ſhould continue as part of his *will*. But now let us conſider of more expreſs revocation, and to that purpoſe will relate a late decree in the *Chancery*, made by the lord keeper, according to the opinion of the maſter of the rolls, three judges, and two doctors, maſters of the court, between *Robert Eyer* and *William Eyre* complainants, and *Heſter*, late wife of *Chriſtopher Eyre* their brother, and now wife of Sir *Francis Wortley* defendant: thus was the caſe. The ſaid *Chriſtopher Eyre*, 15 *Jacobi*, by his laſt *will* and teſtament giveth and bequeatheth to the ſaid *Robert Eyre* his brother an hundred pounds, and to the ſaid *William* his brother a thouſand pounds, and gives to the ſaid *Heſter* his wife all the reſidue of his eſtate, and makes and ordains the ſaid *Heſter* his ſole and only executrix, ſaving, for the performance of his *will*, he orders *Robert Eyre* and *William Eyre*, his ſaid brothers, and intreats them to join as executors in truſt with his wife, for the better performance of this his laſt *will*. Afterwards, *Jan.* 5. 1624. being ſick of the ſickneſs, whereof he died, he was moved by Maſter *Damport* and Maſter *Stone* to ſettle his eſtate: to which motion he yielded: and Maſter *Stone* and Maſter *Damport* did demand of the ſaid *Chriſtopher* what friend he

thought fitteſt to be his executor, and to whom he would commit the care of diſcharging his funeral, and performing his *will*, whether he truſted any perſon more than is wife to be his executor. To whom he anſwered, that his wife was the fitteſt perſon for that purpoſe, and therefore ſhould be his ſole executrix. And then the teſtator was moved by Maſter *Stone* to give and bequeath legacies to his father, to his brethren, and to his kindred: whereupon he anſwered, he would give or leave them nothing. And being farther put in mind to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty ſhillings. And being thereupon moved by his wife to give his ſaid God-ſon more, or a greater legacy, or the like in effect, he ſaid, thou knoweſt not what thou doeſt, do not wrong thy ſelf; twenty ſhillings or thirty ſhillings is money in a poor bodies purſe, or the like in effect: and the reſt he left to his wife's diſcretion or diſpoſition. And the ſaid teſtator did ſpeak the words aforeſaid, or the like in effect, *Animo teſtandi & ultimam Voluntatem declarandi*, as the witneſſes then preſent did conceive.

This *will* was proved by the oath of the ſaid *Heſter*, and this codicil pleaded as a revocation of the ſaid bequeſt, the ſaid maſter of the rolls, judges and doctors, were by the lord keeper and the order of the court deſired to reduce the matter upon the *will* and codicil into a caſe, and to certify their opinions, whether the ſaid codicil were a revocation of the legacies given to the plaintiffs, or not. And they, after council heard at ſeveral times, *viz.* both common lawyers

Ord. 27 Jun. 2. 2 Caroli Regis.

lawyers and civilians, and many hours ſpent in conference together, did finally reſolve with one unanimous conſent, that the legacies to the plaintiffs given, were not by the ſaid codicil revoked, and ſo certified under their hands. Upon reading whereof *Novem.* 25, decree being reſolved to be made, if cauſe were not ſhewn to the contrary *Novemb.* 27; on which day the defendant's council, before the lord keeper, in the preſence of the maſter of the rolls and the ſaid three judges, and Sir *John Heyward*, alledging what they could in ſtay of the ſaid decree; it was by a general concurrence of opinion decreed, that the legacies given to the ſaid plaintiffs ſhould be to them paid on our *Lady*-even, with twenty nobles in the hundred for the detainment thereof.

This caſe, I thought fit to relate ſomewhat at large, becauſe it pitched upon the point of revocation, without plain, full and expreſs terms. And ſurely, as *wills* are to be made out of diſpoſing memories and underſtandings, ſo alſo with deliberate and adviſed judgments; and therefore by like reaſon not to be countermanded or revoked by ſick or ſlight expreſſions. And this ſeems to me very agreeable with the rule and reaſon of the common law. For as reaſon itſelf doth dictate, that *Nihil tam conſentaneum eſt æquitati naturali, quam unumquodque diſſolvi eodem modo quo conficitur*; ſo hath the common law of *England*, in my underſtanding reſolved: as for the purpoſe, if the king preſent a clerk to a church, and he is thereupon admitted, and inſtituted thereunto; now yet before induction may this be revoked as a *will* may: yet if the king ſhall after, and before induction, preſent another

man to this church, without an expreſs repeal or countermand of the former preſentation; it ſhall not thereby be revoked. So if lands were conveyed to certain uſes, with a clauſe or power of revocation, the ſale of the ſame to another did not revoke the former: but if a ſtate were meerly at will, then the conveyance to another by the common law amounted to a revocation. Therefore was the ſtatute made *tempore Henrici* 8. to redreſs this, *viz* that where the King had granted lands or other things to one during his pleaſure, this ſhould not be revoked by a grant to another, without recital of the former, and declaration that the king had determined his pleaſure.

To help this was the ſtat. made 27 El. cap 4.

6 H. 8. cap. 9.

Being now to conſider of relation in the executors aſſent, it is meet, ſince theſe diſcourſes are principally intended for thoſe who are not grounded ſtudents in, or profeſſors of the law, that we ſhew what we mean by relation, or what it is in law. Thus therefore be it conceived, that relation is a kind of fiction in law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time paſt. As for the purpoſe, *A.* doth bargain, and ſell freehold land to *B.* in *Auguſt* by indenture, which is not inrolled till *October* following; yet this hath ſuch relation to the date of the indenture, that if *A.* after that, and before the inrolment, become bound in a ſtatute, or granted a rent charge, or made a leaſe for years, or took a wife, or committed felony, yet ſhall none of theſe be of any force to charge or prejudice the ſtate of *B.* for that the law adjudgeth him now owner by relation as from the time of the date: yea if a ſer-

Relation what.

ſervant departed in *Auguſt* for ſome great breach with his maſter, do kill his maſter, in *October*, this is in law petty treaſon, as if he had continued ſervant when he did the fact; becauſe it relates to the malice conceived when he was his ſervant. Now having ſhewed that a term or other chattel real or perſonal paſſeth not, nor is transferred in property to the deviſee, until the aſſent of the executor be thereunto had; we now put the caſe that this aſſent is not had till a year or ſome ſuch good ſpace after the teſtator's death, and make our queſtion, whether this ſhall have relation to the teſtator's death, *viz.* to be in the law's account as if it had then been; or, perhaps, to ſome purpoſes ſo to ſtand, and to others not ſo? That this is uſeful and material to be known, be it thus ſhewed. One bequeathed his term of tithes of an advowſon of an houſe or land by him firſt leaſed to an under-tenant for rent, and dieth in *May*, the executor aſſenteth to the bequeſt in *October*, between which two times tithes be ſet out, the church becometh void, rent groweth payable; now if this aſſent ſhall relate to the teſtator's death, the deviſee ſhall have theſe, elſe not. The like caſes may be put of the brood of cows, mares and ewes, fallen between the death of the teſtator and the aſſent; ſo alſo of fleeces of ſheep ſhorn, *&c.*

Now to come to the point, it is reported by the Lord *Coke* to have been held in the late Queen's time, that this aſſent ſhall, as between the executor and the legatee, have relation to the teſtator's death, yet ſo that if the executor before his aſſent to the deviſee of the leaſe committed waſte, now the action of waſte ſhall be brought

Tr. 41 Eliz. Co. l. 5. f. 12 B. Sander's caſe VidePlow. . om. of treſpaſs againſt a ſtranger for taking before aſſent, 280. b.

brought againſt the executor in the *Tenuit* for the waſte done before, and not againſt the deviſee in the *Tenet*.

But put the caſe that the legatee before the executors aſſent granted the term to *J. S.* now if to any purpoſe this aſſent ſhall have relation, it ſhall certainly ſo be, to make good this grant, as making the legatee to be eſtated, and conſequently able to grant before the executor's aſſent; yet do I not find any opinion or reſolution in the point, but find it debated at the bar in the late Queen's time between *Puckering* and *Egerton*, in the caſe of adminiſtration granted to *A.* after her grant of a free term left by her inteſtate huſband; but I find no reſolution therein, nor perhaps wants there material difference betwixt that caſe and the other; for there the deviſee had at leaſt an inception of title by gift of the owner, wanting only a circumſtance of aſſent to perfect it; but here this woman till adminiſtration, had not ſo, unleſs, perhaps, the ſtatute 21 of King *Henry* the eighth, directing or enjoyning ordinaries to grant adminiſtration, ſhall amount to a kind of title *ad rem*, though not yet *in re*. But to return to the point of *Aſſets*; where a reverſion is granted by deed or fine, if the leſſee a good time after do attorn, this ſhall have no relation to the time of the grant; ſo as for waſte committed or rent grown due between the grant and attornment, the grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the aſſent of the executor before the ſale or gift well teſtified; or if the aſſent be not had till after, let him take a new gift, that he may not reſt in a doubtful caſe:

P. 25 Eliz.

caſe: for beſides the premiſſes, that great legiſt Sir *Edward Coke*, when he was a practiſer (to Mr. *Stubbs* of *Norfolk*) for his fee, gave his opinion, as I have been confidently informed, that where a leſſee for years being outlawed did grant his term, and after reverſed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant. And this hath much affinity with the principal point; for there, if the relation help not, the grant is not good from the legatee.

Divers caſes of bequeſts conſidered and expounded.

IF a termor of an houſe bequeath his houſe to *B.* without expreſſing how long he ſhould have it, he ſhall have the whole term, and number of years. So of land. 14 El. Dy. 307. Cont. in a grant 31 Eliz.

Alſo of the name of the houſe, the orchards, gardens and backſides do paſs: yea, if the houſe with the appertenances be bequeathed, thereby the land belonging to the houſe, or uſed with it, do paſs, though yet they would not ſo do by ſuch words, in any leaſe, deed or grant. Yet by ſome civilians or canoniſts, the orchard belonging to an houſe ſhall not paſs by the only gift of the houſe, without ſome words ſhewing the intent of the teſtator ſo to be, or except one gate or door lead as well to the orchard as to the houſe: but ſome other of them hold, that it doth paſs without any ſuch help of circumſtance, ſo as it be adjoining to the houſe. Gulliver v. Poyntz. Mich. 11. G. 3. C. B. 3 Wilſon. Sum. Sylv. 286.

If a leſſee for years give his term by his *will* to *A.* he ſhall have it without paying any rent, for the executors ſhall pay it for him,

as

Ford. ut ſup. as I find in the ſummiſt; but againſt reaſon, methinks.

If one bequeath his indenture of leaſe, his whole eſtate in that leaſe paſſeth. So if one bequeath his obligation or other ſpecialty, the debt or duty itſelf ſhall go to the legatee; and by the canon or civil law the very action itſelf paſſeth, *viz.* as I conceive, ability to ſue the debtor in his own name: but in our law it is otherwiſe, the ſuit muſt be in the executors name, for a debt or thing in action cannot be aſſigned, except by or to the king; and only at the common law is the debt recoverable; but the ſpiritual court may force the executor to ſue, or let his name be uſed in the ſuit, for and by the legatee.

Ibid. ut ſup.

Yet 48 E. 3. 12. 13. it is admitted, that ſuch a deviſee of all goods, after debts payed ſhall have a duty reſting in account.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corn, nor fruit growing on the ground, nor ſtone, nor timber prepared for building, as the canoniſts and civilians hold.

On the other ſide, if one bequeath the moiety of all his goods, the legatee ſhall have only the moiety of that which remains after debts payed; for that only is to be accounted the teſtator's which he hath *ultra æs alienum.*

Quæ. 36 H. 8. D. 59. Dy. ibid. ſupra, Sum. Sylv. 216.

By a bequeſt of all utenſils or houſhold ſtuff, plate nor jewels are not given.

If one bequeath to his wife all her apparel, ſhe ſhall not have, as ſome civilians ſay, her ornaments of gold or ſilver; by which is meant, as I take it, chains, jewels, bracelets, rings, *&c.* But others are of contrary opinion, except they be ſuch things as are not lawful for her to wear.

If

If a bed be given by a *will*, *Venit ornamentum ejus*, ſaith the civilian, that is, the furniture thereof paſſeth, *viz.* not only the bed, bedſtead, bed-cloaths, but alſo the curtains and valants, as I take it. But I think that by gift of a coach by *will*, the coach-horſes paſs not; yet perhaps the furniture of the coach-horſes may paſs as appertenant to the coach: for ſo I think they ſhall do, rather than by bequeſt of the coach-horſes without the coach.† Ibid.

If one bequeath to *A.* meat, drink and cloathing, or *Alimenta*, he ſhall have, ſaith the civil law alſo lodging, habitation, and all things neceſſary for the maintenance of life, *viz.* as I take it, fire and waſhing, *&c.* Ibid.

If one bequeath to his daughter ten pounds a year for her apparelling, and ſhe demandeth none in four years now ſhall ſhe not after that time have the arrearages of this ten pounds by year for the time paſſed. Ibid. b.

If a man bequeath one of his horſes or cows, not naming which, to *J. S.* he is to chuſe which he will, ſo it be not the beſt of all, ſaith the civil law: and perhaps the mention of that exception grows, out of reſpect to the herriot, which the lord ſhould have, or the mortuary, which the parſon ſhould have.

A Man bequeathed thirty pieces of twenty ſhillings to *A.* twenty to *B.* and ten to *C.* to be Ibid.

---

† If a man deſires his ſilver tea kettle and lamp with the appertenances, nothing ſhall paſs but the kettle and lamp, and the box wherein the lamp was placed, and not the ſilver tea-pot, milk-pot, tongs, ſtrainer or canifiers, Eq. Caſ. Abr 201. Moſeley 47.

had

had in ſuch a cheſt or caſket, and it is found after his death that there be but thirty in all in that caſket or box; now each ſhall be abated ratably, ſaith my ſummiſt, ſo as *A.* ſhall have fifteen, *B.* ten, and *C.* five; and this ſtands with good reaſon and juſtice; for ſo each hath a proportionable part. And it was reaſonable that it were by parliament eſtabliſhed for law, that all, both legatees and creditors, ſhould be payed in like proportion, where the ſtate will not ſuffice for full payment of each, rather than that an executor ſhould have power to pay one all, and another nothing: yet if the teſtator left ſufficient to make good all thoſe ſixty pieces bequeathed, *Quære*, if that which is wanting in the caſket ſhall not be ſupplied and made up; for if the caſes following found with the ſame author be good law, it ſhould ſeem ſo to be.

Sum. Sylv. 286. If one, ſaith he, bequeath to *J. S.* that which is another man's, and whereto the teſtator hath no right; then ought his executor to buy it, and give it to the legatee, or elſe ſatisfy him to the full value; and this, not only by the civil, but alſo by the canon law, and *in foro conſcientiæ*, ſaith my author.

Ibid. 287. Again, if *A.* bequeath to *B.* ſuch an horſe by name, and after ſell away that horſe, and dieth; now is his executor bound to anſwer the value thereof to *B.* and if the teſtator, after his ſale of that horſe, had bought another and called him by the ſame name as the firſt; now ſhall this later horſe paſs to *B.* ſaith the book, except it can be proved that the teſtator ſold the former horſe of purpoſe to revoke his *will* touching that bequeſt. Ibid. 216.

So again I find, that if one having but a moiety or one half of a green close, or of a stack of corn, or other chattel, doth give the whole, so as the words be apparent to reach to more than his moiety, then must the executors buy out the other's part for the legatee, or give him the value: but if the words be but general, so as they may be reasonably satisfied with the testator's part, no supply shall be made. So also if one, having goods in pledge, bequeath them, it shall be construed to extend no further than his right.

A bequest is made of an hundred pounds to be payed at a future time, *viz.* divers years after the testator's death; a question is made by the summist, whether the profit of the money in the mean time shall go to the legatee, or the executor: and he resolves with this difference, if the day were given in favour of the legatee being an infant who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were in favour of the executor, then shall the legatee have but the bare sum, without any addition of mean profits. Ibid. 284. a.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequest; because it is no more than the law would say, if he had said nothing. So if it be generally to perform his will. 15 El. Dy. 331. Plow. Com. 545. b. Co. lib. 8. 96. a.

If one, seized in fee-simple of land, bequeath it to his executor to pay debts, the executor hath no estate of freehold: for if he should, then it must be either for life, which might end by his quick death before debts payed; or in fee-simple, which would carry away the land for ever

ever from the heir, where perhaps a few years profit might ſuffice to ſatisfy the debts; yea then by death of the executor the land ſhould deſcend to his heir, and not go to his executor, who would be executor of the firſt teſtator.

By deed or word in life, 4 E. 6. Bro. Done, &c. 43. Tr. 37 El. in B. R. Portman ver. Simmes or Willis, divers times argued.

If one give or grant all his goods, having leaſes for years as well as moveables, the leaſes ſhall not paſs, as was held in the time of K. *Edward* the ſixth. And ſo alſo was it admitted in *Portman*'s caſe. For the word *Bona* comprehendeth only moveables, by the better opinion there. But the point in that caſe was pertinent to this place, *viz.* a bequeſt in a *will* of all the teſtator's goods: and whether thereby a leaſe for years paſſeth or not, was divers times debated, but not reſolved, the judges differing in opinion in that point; but in another point, which made an end of the caſe, all agreed. Yet the better opinion was, as I find in my report, that a leaſe would paſs by ſuch words in a *will*, though not in a deed or grant by word otherwiſe made; for the legacies are demandable in the ſpiritual court, where *Bona & Catalla* are taken for all one. See alſo the ſtatute of *Marlb.* giving an action to the ſucceſſor. *Ad repetenda bona prædeceſſ.* Yet an *Eject. cuſtod.* hath been maintained thereupon. So alſo upon the ſtatute of executors, *De bonis aſportatis in vita Teſtatoris*, hath it been reſolved, and where adminiſtration is granted, it is only *omnium Bonorum*, without ſpeaking of chattels; yet hath the adminiſtrator intereſt in leaſes as well as moveables. On the other ſide, the ſtatute *de Prerog. reg.* mentioning only forfeiture *de Catallis*, is clearly extended to moveables: ſo alſo in the writ of aſſize *De Catallis quæ in eo capta fuerint* and

Cap. 28.

4 E. 3. c. 7. So the ſtat. 5. R. 2. of forfeiture of goods by thoſe who go beyond the ſea, cap. 16. In all theſe goods are comprehended. 13 H. 7. Kelw. Rep. 33. a.

and in the writ of execution upon a ſtatute there is only the *Catalla*, and not *Bona:* and in the caſe reported by *Kelway temp. Henry* 7. it ſeems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that theſe ſtatutes and writs were alledged or conſidered of, *temp. Edw.* 6. but in *Portman*'s caſe the moſt of them were.

If one *will* that his wife, or any other, ſhall have, or hold, or enjoy the moiety of his leaſe with his executor, this implieth not that the executor have the other moiety as a legacy alſo, but otherwiſe as the law caſts it upon him; no more than where the moiety of fee-ſimple land is deviſed to the younger ſon, this ſhall not make the elder ſon to have the other moiety otherwiſe than by deſcent, as between *Low* and *Carter* was conceived. But there being a proviſo in the wife's bequeſt, that if ſhe married from the houſe, then, *&c. Popham* ch. juſtice, held, that if ſhe married at all, this was a marrying from the houſe; for ſhe was no longer widow of that houſe, though ſhe married with one of that kindred, and who had no other houſe, but would dwell in the bequeathed.

Low and Carter's caſe, Tr. 37 El. in Ban. Reg.

CHAP. XX.

Of the executor of an executor.

I Should be taxed of omiſſion, if I ſhould not ſhew whether the things foreſpoken of executors immediate extend, alſo to the mediate or more remote executors. Aſſuredly, were I not

See Plow. 184. a. debt againſt the executor of an executor.

by the books otherwiſe informed, I ſhould think it ſomewhat ſtrange, that the mediate executor in the fourth, fifth or farther degree, ſhould not by the rules of the common law, ſtand in like plight executor to the firſt teſtator, as the firſt and immediate executor; as well as the heir and aſſignee in the third or thirteenth degree is capable of all advantages in like ſort as the firſt and immediate heir and aſſignee. And indeed, we find both in the time of *Edward* the ſecond and *Edward* the third, execution ſued out upon a judgment and ſtatute by an executor of an executor; and why he might not as well maintain an action of debt, *&c.* I ſee not. But I muſt confeſs, I find both books to the contrary before any ſtatute made in the point, and after an act of parliament to enable them to bring actions, and to make them ſubject to actions; yet the ſtatute ſpeaks nothing of conferring upon them the teſtator's goods. Now if they had title to them before that ſtatute, it is ſtrange if they ſhould not be ſuable for debts. But ſince that ſtatute, and at this day, where by a *will* a ſpecial truſt is recommended to an executor, as to ſell land, *&c.* this not performed in his lifetime ſhall not be performable by his executor: contrariwiſe of an intereſt, as to take the profits of lands for certain years towards payment of debts and legacies. And where the ſtatute *temp. H.* 8. gives remedy to executors for recovery of rents of inheritance behind in the teſtator's life, I doubt not but executors of executors are within the equity, as well as within the ſtatute 9 *Ed. 3. cap. 3.* that the executor who appears at the grand diſtreſs ſhall anſwer alone. Yet the ſtatute *Weſt. 2. cap. 23.* for executors,

19 Ed. 2. & 14 Ed. 3 Fitz. Executor 87 & 103.

11 Ed. 5. & 13 Ed. 3. Fitz. Ex. 78. 25 Ed. 3. c. 5.

19 H. 8, 9, 10. 4 El. Dy. 201. 22 H. 8. cap. 37. See 32 H. 8. 28. Leaſes. And 32 H. 8. cap. 33. Condition. And 13 El. cap. 5. & 27 El. ca. 4. of fraudulent conveyances. 21 H. 8. cap. 15. for falſifying recoveries. 39 H. 6, 45. 7 E. 3 62.

cutors, was not to extend to executors of executors. *Quod non eſt lex.* So as now in all caſes, except of ſpecial truſt or authority without the office of executorſhip, the executor of an executor, how far ſoever in degree remote, ſtands as to the points both of being, having and doing, in the ſame ſtate and plight as the firſt and immediate executor.

The eſtate of the firſt teſtator is liable into whoſe hands ſoever it come. *Ch. Rep.* 257. 30 *Car.* 2. *cap.* 7. made perpetual by 4 & 5 *W. & M. c.* 24. *ſect.* 12.

CHAP. XXI.

Touching Adminiſtrators.

OF theſe alſo, as ſtanding in much affinity with executors, it may be by ſome expected that I ſhould have treated. But firſt, my excuſe is, that theſe of executors only having grown to ſo great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of having and doing is before ſet forth and ſhewed touching executors, may be applied to and underſtood of adminiſtrators; though not what is ſpoken of being and unbeing, or revocation of executorſhips, and other circumſtantial points.

Laſtly, I may perhaps, if theſe find good acceptance, add ere long that which appertaineth to adminiſtrators diſtinguiſhed from executors, or wherein they ſtand in different ſtate.

See more concerning adminiſtrators in the ſupplement to this treatiſe hereafter.

CHAP. XXII.

Conſiderations in conſcience touching payment of debts, legacies, and the preferring or reſpect of perſons.

TO the advertiſement, what courſe executors are to hold in their payments, I thought good to add this *in foro Canſcientiæ*; that when as it ſhall ſtand in the executor's *will* and election to pay whom he will, and as he will in reſpect of equality in the dignity and degree of the debts, all being for the purpoſe by the ſpecialty, and none of record, and yet he hath not wherewith to pay or ſatisfy all, here he may have three ways or courſes in his eye.

Firſt, where there is equality in the honeſty and conſcience of the debts, there (except in the ability of the parties to bear loſs the diſproportion may otherwiſe occaſion) methinks it ſhould be moſt honeſt and juſt to pay every one proportionably, and to let the loſs of every one to be equal. And the juſtneſs of this is taught by the law, which gives the *Audita querela* for equal contribution in bearing of loſs by them who ſtand in equal degree: ſo of legacies.

2. The property and inability of ſome, and the plenty of others, may *in foro Conſcientiæ* juſtify the paying more to one, and ſuffering him to loſe leſs, (if any thing) than another. For if the widow's mite was a greater gift, ſo a greater loſs than more out of abundance. Where charity finds or may find place or nearneſs to place of giving, it may find greater motives of preſerving from loſs: ſo of legacies.

The

The nature of the debts, and ſo ſometimes of legacies, may be ſo different, as thence may ſpring a juſt motive to diſproportion payments, to pay more to one than another, rate for rate, and ſo to ſuffer one to loſe more than another. One debt may perhaps be uſe for money, or at leaſt money lent for uſe; another may be money freely lent; another debt for land of inheritance bought; another debt for a leaſe, chattels or moveables, come to the executor. The firſt merits the leaſt reſpect, next the ſecond, then the third, and the laſt the moſt. But where without any of theſe motives there is not equality held in the payment, *peccatur*, (as I think) *in Conſcientiam*. But let every one ſtand or fall by or to his own, or to him who is greater than his conſcience. This equality Saint *Paul* in another caſe recommends to the *Corinthians*. And *Solomon*, whilſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equal diviſion of the child between the mothers, who were joint claimers and competitors for it. 3. 2 Cor. 8. 14.

See more of conſcience, *Doct.* and *Stud.*

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SUPLEMENT

TO THE

OFFICE and DUTY

OF

EXECUTORS.

T SUP-

SUPPLEMENT.

The divers definitions or ſignifications of the words or terms, laſt will, teſtament, codicil, executor, adminiſtrator, deviſe, legacy, and gift in conſideration of death.

ADAM by free donation, rather than primogeniture, had (*ab initio*) dominion over all the earth, which deſcending to his poſterity, when they encreaſed, was by them divided reſpectively into territories of particular dominion: for *Abel* having ſheep and cattle, had conſequently paſtures of his own; and when *Cain* built the city of *Enoch*, in the land of *Nod*, he had conſequently lands that were particularly his own: and when *Noah*, with his family, only remained living after the general deluge, the earth was divided by his poſterity. And it appears by ſacred ſcripture, that *wills* and *teſtaments* were in uſe among the ancient *Hebrews*; for *Abraham* had made *Eliezer* his heir if he had died without iſſue male. *Gen.* 15. And *Abraham* diſmiſſing his other children with filial portions, he made his ſon *Iſaac* his heir of all he had. *Gen.* 25. And *Iſaac*, when *Eſau* had ſold his birth-right, appointed *Jacob* his heir and executor. *Gen.* 27. And *Jacob* likewiſe, by his *will*, gave to his ſon *Joſeph* one portion above his brethren, which he took from the *Amorite* with his ſword. *Gen.* 48. 22.

Vide ante p. 3. In law moſt commonly ultima voluntas in ſcriptis is uſed where lands or tenements are deviſed, and teſtamentum when it concerneth chattels. Co. Lit. 111.

Now altho' teſtators and executors are ſaid to be *Correlativa*, and that there is relation betwixt a *will* and an executor; yet becauſe there may be a *will* without naming an executor, but no teſtament without an executor named; and an executor being appointed by teſtament, (which taken in the largeſt ſenſe is the ſame with a laſt *will*) and hath the commencement of his authority and intereſt thereby, it will be requiſite in the firſt place to declare, that although a teſtament and laſt *will* in ſome reſpects are both one thing, yet in other reſpects there is a diverſity between them. For as a laſt *will* being a general term agreeth with every ſeveral kind of laſt *will* or teſtament; ſo teſtament being generally taken *quaſi teſtatio mentis*, differeth not from a laſt *will*; for any laſt *will*, be it a codicil, or other kind, may in that ſenſe be termed a teſtament: but a teſtament † taken ſtrictly it is underſtood to be that particular kind of laſt *will* wherein an executor is named. By which it appears, that every teſtament is a laſt *will*, but every laſt *will* is not a teſtament.

Teſtament, what poſt. p. 36.

But as no laſt *will* is of any force *ſine animo diſponendi*, ſo no teſtament is of any force *ſine animo teſtandi*.

Codicillus, a codicil, is a diminutive, of *Codex* a book, and is moſt properly defined after this manner; *Codicillus eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri*

Codicil, what.

† The conſtitution of an executor is the eſſence of a *Teſtament*, Dr. Harris's Notes on Juſtin. Inſt. 44. Edit. 1756. A teſtament may be made in five words, viz. LUCIUS TITIVS MIHI HÆRES ESTO. ibm.

vellet

vellet abſque executoris conſtitutione. A codicil, is a juſt ſentence of our *will* concerning that which any one would have to be performed after his death, without the appointing of an executor. By force of which words *abſque executoris conſtitutione*, a codicil is made to differ from a teſtament: for as a teſtament cannot conſiſt or be without an executor, ſo a codicil cannot admit of an executor, being an unſolemn laſt *will*. And codicils, when firſt invented, where only uſed when the teſtator had not opportunity to make a teſtament, by reaſon of the manifold ſolemnities thereof; or elſe as additions to the teſtament made when any thing was omitted therein; or ſomething in ſuch teſtament which the teſtator, upon better advice and conſideration, would alter or retract. And a codicil may be made either in writing, or without; and by him which dieth inteſtate, or by him which dieth with a teſtament. And if it be made by a perſon which dieth inteſtate, the legacies therein given muſt be paid by him that ſhall have the adminiſtration of the goods of the deceaſed. And if the codicil be made by him which hath a teſtament, then whether the ſame be made before or after the teſtament it is reputed parcel thereof, and is to be performed as well as the teſtament: Unleſs being made before the teſtament it appear to be revoked in the teſtament, or to be contrary thereunto. And codicils and teſtaments do both agree in the efficient cauſe; becauſe every perſon which can make a teſtament may alſo make a codicil *& è contra*, but they have divers contrary effects. For firſt, whereas no man can die with two teſtaments, becauſe the latter doth revoke the former;

Vide hic poſt. p. 19.

mer; yet a man may die with divers codicils, and the latter doth not hinder or revoke the former. And ſecondly, If two teſtaments be found, and it does not appear which was the former or latter, both teſtaments are void; but if two codicils be found, and it cannot be known which was firſt or laſt, and one and the ſame thing is given to one perſon in one codicil, and to another perſon in another codicil, the codicils are not void, but the perſons therein named ought to divide that thing betwixt them.

Definition of an executor.

Executor, *ab exequendo*, is he that is appointed by any man in his laſt *will* and teſtament to have the diſpoſing of all his ſubſtance, according to the contents of the ſaid *will*. This executor is either particular or univerſal: particular, as if this or that thing be committed to his charge; univerſal, if all. And this is in the place of him whom the civilians call *Hæredem*, and the law accounteth him one perſon with the party whoſe executor he is, as having all advantage of action againſt all men, that he had, ſo likewiſe being ſubject to every man's action as far as himſelf was. This executor had his beginning in the civil law by the conſtitutions of the emperors, who firſt permitted thoſe that thought good by their *wills* to beſtow any thing upon good and godly uſes, to appoint whom they pleaſed to ſee the ſame performed; and if they appointed none, then they ordained, that the biſhop of the place ſhould have authority of courſe to effect it. But now an executor is generally taken to be a perſon appointed by the teſtator to execute his laſt *will* and teſtament, and hath the

Diviſion, Vide ante p. 12.

Their beginning in the civel law.

the property or intereſt in the teſtator's goods and chattles, upon confidence to diſpoſe them according to the *will* as the law directs.

Adminſtrator, *ab adminiſtrando*, in our common law is taken for him that hath the goods of a man dying inteſtate, committed to his charge by the ordinary, and is accomptable for the ſame, and to anſwer debts and legacies as executors to the value of the goods of the dead, and no further, unleſs it be by his own falſe plea, or by waſting the goods of the dead; and if ſuch adminiſtrator die, his executors are not adminiſtrators; but it behoves the ordinary to commit a new adminiſtration. Adminiſtrator what.

If no perſon will adminiſter, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the inteſtate into his own hands, wherewith he is to pay debts and legacies ſo far as the goods will reach, and thereby he becomes liable in law as executors or adminiſtrators. But he that hath a letter from the ordinary *ad colligendum bona defuncti*, is not adminiſtrator, but the action lieth againſt the ordinary as well as if he take the goods into his own hands. Letters ad colligendum.

Deviſe, (from the French word *deviſer*, ſignifying *Sermocinari* to ſpeak, for *Teſtamentum eſt teſtatio mentis, & index animi ſermo*) is by the civilians termed a legacy, and in that ſenſe is a gift left by the deceaſed to be paid or performed by the executor or adminiſtrator after his death; and it is called a gift, for that it proceedeth Co. Lit. 111. Deviſe or legacy what.

ceedeth of the meer liberality and free good will of the deceaſed. And in that it is left, it differeth from other gifts, not only thoſe which are called deeds of gift executed in the life of the donor, but alſo from thoſe gifts which be made in conſideration of death, wherein the things given are delivered by the teſtator in his lifetime, to become their own to whom they are delivered in caſe the teſtator die. For legacies are not delivered by the teſtator, but are left to be paid or delivered by his executor or adminiſtrator.

Gift in cauſa mortis. Pre. in Ch. 269. it is not ſuable in the ſpiritual court. 2 Stra. 777.

A gift in conſideration of death, is where a man in conſideration of his mortality doth give and deliver ſomething to another to be his, in caſe the giver die; but if the giver do not make expreſs mention of his death, they cannot be revoked, but take effect from the time of making the gift, if the ſame be not fraudulent. And if a perſon deliver goods to be kept until he be dead, and then to be diſpoſed or diſtributed *in pios uſus*, in this caſe the perſon is executor of thoſe goods, ſo to be by him diſtributed.

Thus having defined the general terms or things of which we are to treat in this ſupplement, we ſhall now deſcend to ſuch particulars which are to be ſupplied or added therein. And firſt concerning.

Wills

Wills and Teſtaments.

A Teſtament is the true declaration of our laſt *will* in that we would to be done after our death.

Of teſtaments are two ſorts. A teſtament in writing, and a nuncupative teſtament, which is when the ſick man calls his neighbours and friends, and deſires them to bear witneſs, and then declares his *will* by words, which after his death is proved by witneſſes, and then put in writing by the ordinary, which is effectual unleſs for lands which are not deviſable, but by teſtament put in writing during his life. *Termes del Ley. Co. Lit.* 111.

Teſtamentum eſt duplex. 1. In ſcriptis. 2. Nuncupativum, ſeu ſine ſcriptis. Vide ante Wentw. p. 6.

In ſome cities and boroughs lands may paſs as chattels by *will* nuncupative: but in law moſt commonly *Ultima voluntas in ſcriptis* is uſed where lands or tenements are deviſed and *Teſtamentum* when it concerneth chattels. And by the ſame cuſtom a rent may be deviſed out of lands or tenements. At common law no lands or tenements were deviſeable by any laſt *will* and teſtament, nor ought to be transferred from one to another, but by ſolemn livery of ſeiſin, matter of record, or ſufficient writing; but by certain cuſtoms in ſome boroughs were deviſable. *Coke's* 1 *Inſt.* 111, 112. *Coke's* 2. *Inſt.* 7.

But now by ſtatutes 32 & 34 *H.* 8 and 12 *Car.* 2. which turneth all tenures into plain and common ſoccage, all lands and tenements are de-

deviſable by *will* in writing of the tenant in fee-ſimple, whereby the common law is altered. And thereupon many difficult queſtions, and moſt commonly diſinheriſon of heirs, do ariſe and happen. *Vide plus Coke's* 1 *Inſt.* 111.

Swinb. 67. 2 Jones 210. 2 Mod. 315. 2 Vern. 469. The age of 14 is now allowed in chancery. Vide ante p. 214. poſt. p. 27.

An infant, at the age of eighteen years, or as ſome ſay fourteen, may make this teſtament, and conſtitute executors for his goods and chattels, *Coke's* 1 *Inſt.* 89. *b.*

The maxim of common law is, that *Ultima Voluntas Teſtatoris eſt perimplenda ſecundùm Veram intentionem ſuam.* And *Reipublicæ intereſt ſuprema hominum Teſtamenta rata haberi.* Coke's 1 Inſt. 322. b.

A *will* countermanded by a feoffment, and judgment given for the plaintiff, although the title which he made for himſelf were deſtroyed. *Coke* 8 *Rep.* 93. *Fraunces's Caſe.*

The taking of huſband and coverture at the time of her death, was a countermand of the *will* of the wife made before the coverture. *Coke's* 4. *Rep.* 61. *Forſe and Hembling's Caſe. Vide ante p.* 21. *poſt p.* 12.

Co. Lit. 9. 5 Co. 21. Cro. El. 378. Cro. Jac 527. Cro. Car. 158, Bendl. 15. 2 Lev. 249. 2 Salk. 685. 2 Mod. Rep. 25. 1 Jon. 211, 1 Bulſ. 194. Cro. Car. 416. Ackland and Ackland. 2 Vern. 687. Murry and Wife. 2 Vern. 564.

A man by *will* in writing deviſeth part of his land to his daughter, and the other part to his wife for her life, with the profits whereof ſhe ſhould bring up his daughter; and that after her death it ſhould remain to her brother, he paying to one twenty ſhillings, and other ſmall ſums, amounting to forty ſhillings. In this caſe, it was adjudged the brother had fee-ſimple; the value of the land being but three pounds *per Annum.* But if the deviſe had been, with the

profits of the land to educate his daughter, or with the profits of the land to pay ſo much as thirty or forty, or fifty ſhillings *per Annum*; it is but an eſtate for life, for he is ſure to have no loſs. *Coke's 6 Rep. 16. Collier's Caſe.*

It appeareth by *Glanville*, who was chief juſtice in the time of *H. 2. lib. 7. cap. 1. fol. 44. b.* That every freeman, without the aſſent of his heir, might diſpoſe of a reaſonable part of his lands with his daughter in *frank-marriage*, to ſome religious houſe to have divine prayers made for him in *frank-almoigne*, or to any ſervant in recompence of ſervice, but all *that* muſt be in time of health; but if it were made in time of ſickneſs, the conſent and confirmation of the eldeſt ſon was requiſite to it: and a man could not have given any to his youngeſt ſons without conſent of the eldeſt; but of land which he had purchaſed he might have given part to his youngeſt ſons; and if he had no iſſue he might have given all to whom he pleaſed. And if lands are given to a man and his children, or iſſue, and he hath not any at the time of the deviſe, it is an eſtate tail, *&c.* And the ſtatutes 32 *&* 34 *H.* 8. enabling the making of *wills* were made to the great diſadvantage of heirs at the common law. *Vide plus Coke's 6 Rep. Wylds's Caſe. Cro. El.* 525. *Moor* 422. 1 *Vent.* 225. 2 *Lev.* 58. 3 *Salk.* 126.

Probate of a teſtament ſhewed forth under ſeal of the ordinary, yet the other party may plead that he who is dead died inteſtate: ſo if iſſue be taken upon probate of a *will*, or if adminiſtation

miniſtration were committed (although they ſhew the biſhop's letters teſtimonial) it ſhall be tried by jury. And of divers manners of proof and trial, ſee *Coke's* 9 *Rep.* 32. Caſe of Abbot of *Strata Marcella*. *Vide ante p* 47.

The writ is ſecundum conſ. in eadem civitate hactenus obtentam & approbatam, &c.

When a man maketh a deviſe of lands in *London*, and alſo of his goods, then firſt the executors ſhall prove the ſame before the ordinary, and then after they ſhall bring the ſame before the Mayor into *London*, *&c.* and it ſhall be there inrolled; and then upon that inrolment the mayor, upon *Ex gravi Querela*, ſued for the lands, ſhall do execution, and ſuch proceſs as upon a fine of lands, *&c.* And by the writ it appears, that a man may have a writ to the mayor to compel the executors to bring in the *will* to be proved before them in *London*, and to be inrolled in the huſtings. The ſame in *Oxford*. And thereby it ſeemeth reaſonable it be ſo done in every other city where lands be deviſeable, that the executors and deviſees ſhall have ſuch actions againſt the ordinary; and alſo of the bailiffs of the towns and boroughs to prove ſuch *wills*. *Vide plus de hoc*, and the forms of the writs. *F. N. B* 459, 460 4° *Edit. &* 198 *b.* 8° *Edit.*

If the mayor, &c. will not prove the *will*, the deviſee and executors may have a writ to compel them, and thereupon an alias & pluries, and an attachment if need be.

Deviſer is *French*, and ſignifieth *Sermocinari*; for *Teſtamentum eſt teſtatio mentis, & index animi ſermo*, as is ſaid before. Now if a man deviſeth either by ſpecial name, or generally, goods or chattels, real or perſonal, and dieth, the deviſee cannot take them without aſſent of the executor: but if a man is ſeiſed of lands in fee, and

Executors aſſent neceſſary to a deviſe of chattels, but he hath no concern with lands.

and deviſeth the ſame in fee, in tail, for life, or for years, the deviſee ſhall enter; for in that caſe the executors have no medling therewith. *Coke's* 1 *Inſt.* 111. *a.* *Vide ante p.* 27 *& poſt. p.* 168.

And this deviſe of lands is good without any attornment of leſſee or tenant. *Ibid.* 112. *a.*

An expreſs warranty cannot be created by *will*; for a *will* in writing is no deed. But if a man deviſe lands for life, or in tail, reſerving a rent, the deviſee ſhall take advantage of this warranty in law albeit the anceſtor was not bounden. *Coke's* 1 *Inſt.* 386. *a.*

If a lord hath probate of teſtaments made within his manor, he cannot prove a teſtament made out of the precinct of his manor. *Coke* 2 *Inſt.* 231.

The prerogative court of *Canterbury*, where all teſtaments are proved, when the party dying hath *Bona notabilia*, in ſome other dioceſs within that province, which regularly is to the value of 5 *l.* but in the dioceſs of *London* it is 10 *l.* by compoſition. The biſhops, lords and commons, aſſent in parliament, that the King may make his teſtament, and ſeveral inſtances thereof. And if the King be made executor, he appoints perſons to execute it. The probate of every biſhop's teſtament belongs to his archbiſhop. *Coke's* 4 *Inſt.* 335, 338. *Vide ante from p.* 42 *to* 50,

Fees of probate of *wills* limited by ſtat. 21 *H.* 8. and adminiſtrations alſo. *Ibid.* 338. 21 *H.* 8. *cap.* 5.

Biſhops

Biſhops anciently could not make their *wills*, but now they may, paying the King their beſt horſe, and five other gifts; for which a writ goes out of the exchequer after their deceaſe. *Coke's 4 Inſt.* 338.

If *feme* ſole make a *will*, and after take huſband, the taking of huſband and coverture at time of her death, is a countermand of the *will* The making of a *will* being only the inception of it: for *Omne teſtamentum morte conſummatum eſt: et voluntas eſt ambulatoria uſq; extremum vitæ exitum.* Vide Coke's 4 Rep. 61. *Forſe* and *Hembling*'s caſe.

Lord Coke's advice to thoſe who would deviſe lands by *will.*

The Lord *Coke* adviſeth all who have lands, to ſettle and aſſure them by advice of council in time of health, to which they may add ſuch conditions or proviſoes of revocations as they pleaſe. But if you pleaſe to deviſe lands by *will*,

1. Inform your counſel truly of the eſtates and tenures of your lands.

2. It is good to make it indented, and leave one part with a friend, leſt it be ſuppreſſed.

3. Call credible witneſſes to ſubſcribe their names at time of publication.

4. If it may be, let it be written with one hand, and in one parchment or paper.

The ſealing it not eſſential. Godol. Orph. Leg. 6.

5. Let the hand and ſeal of the deviſor be ſet to it.

If

6. If it be in ſeveral parts, let his hand and ſeal, and names of witneſſes, be to each part.

7. If there be any interlining, or raſure, make a *Memorandum* of it.

8. If you make any revocation of all, or part let it be by writing, with good advice. *Coke's 3 Rep. 56. Butler and Baker's caſe.*

The cuſtom of a city or borough concerning the deviſe of lands is, *Quod liceat unicuique civi ſive burgenſi, &c. Ejuſdem civitatis ſive burgi tenementa ſua in eadem civitate ſive burgo in teſtamento ſuo in ultima voluntate ſua tanquam cattalla ſua legare cuicunque voluerit, &c.* Coke's 1 Inſt. 111. a.

Cuſtom in a manor to deviſe copyhold without any ſurrender. Co. Ent. 124. Lands deviſable in London by the cuſtom. Co Ent. 515.

By law it is not ſufficient that the teſtator be of memory, but he ought to have a diſpoſing memory, ſo that he is able to make a diſpoſition of his lands with underſtanding and reaſon, (and that is ſuch a memory which the law calleth *ſane* and perfect memory). And upon ſuch matter it was moved in the Marquis of *Wincheſter*'s caſe, in *Coke*'s Reports, to have a prohibition out of the court of *King's Bench* generally, to prohibit all the proceedings in the eccleſiaſtical court, as well for legacies and bequeſts given by the ſaid *will* of the ſaid Marquis to his reputed ſons, or others, in the perſonalty, as for the lands; and the reaſon and ground of this motion was, that foraſmuch as the *will* concerning the land, and the teſtament concerning the goods, are mixed together in one *will*, if the eccleſiaſtical court ſhall proceed con-

And as he ought to be of good, and ſane memory at the diſpoſing, ſo he ought to be when he revokes Cro. Jac. B. R. Cranvell v. Sanders. p. 417.

concerning the teſtament of the goods; it ſhould prevent and prejudice the trial in this court: for if he were of *ſane* memory at the time of making the teſtament of the goods, he cannot but be of the ſame memory at the time of making the *will* of the lands. And the common law ought to determine what ſhall be ſaid perfect memory at the time of making the *will* of the land; and therefore the prohibition ſhould be general, *Quod fuit conceſſum per totam curiam.* And in *Hill.* 38 & 39 *Eliz.* it was ruled accordingly, and that no conſultation ſhould be granted for any party till the matter were tried in that court. *Coke's* 6 *Rep.* 23. *Marquis of Winchester's caſe.*

What words are neceſſary in *wills* to make an eſtate in fee-ſimple, fee-tail, or for life, and what in deeds; and how the intent of the party in *wills* is chiefly to be obſerved. See 1 *Inſt.* 9, *b.*

This doctrine is now exploded, for the deviſees ſhall be joint-tenants where the ſame thing is deviſed to two perſons in a *will.*

Teſtamentum is *Teſtatio Mentis*, and favourably to be expounded according to the meaning of the teſtator, *In contractibus benigna, in teſtamentis benignior, in reſtitutionibus benigniſſima interpretatio facienda eſt.* There being divers *wills* or divers deviſes of one thing, the laſt *will* and laſt deviſe ſhall ſtand. *Coke's* 1 *Inſt.* 112. *a. b.*

4 Mod. 89. Style. 281. 2 Lev. 91. 1 Mod. Rep. 100. 1 Salk. 2. 6. Paſc. 1729. Barry & Edgworth. Cro. Car. 447. 1 Rol. Abr. 834.

All my eſtate in a *will* paſſeth a fee. *Caſes in chanc.* 262. *Tirrel againſt Page.* †

If a feoffment be to perform his *will*, there the feoffer is ſtill ſeiſed, and the land paſſeth

† 1 Wilſon. 333. Frogmorten v. Wright, Eaſter. 13 Geo. 3. 3 Wilſon.

by

by the *will* and not by the feoffment: but if the feoffment be to the uſe of ſuch perſon and perſons and of ſuch eſtate or eſtates as he ſhall appoint, it is otherwiſe. *Coke's* 1 *Inſt.* 271. *b.*

All *wills* concerning lands ſhall be deemed (only as againſt creditors upon bonds, or other ſpecialties, the executors, *&c.*) to be fraudulent and void. *Stat.* 3 *&* 4 *W. & M.* 14 *Wingate's Abridg. Frauds* 1, 2, *&c.*

And ſuch creditors may have actions of debt againſt the heirs and deviſees jointly, &c. But deviſes of lands for payment of juſt debts or childrens portions, other than the heir at law, in purſuance of marriage agreement in writing before marriage ſhall be in force, 3 & 4 W. & M. c. 14.

No teſtament may be inrolled in the huſtings, *London*, unleſs the teſtator put to his ſeal: but teſtaments that may be found good and legal are effectual, although not inrolled or of record.

The teſtament there ought to be adjudged effectual and executory, having regard to the teſtator's *will*, although the words be defective, and not according to common law.

And as lands and tenements, ſo rents and reverſions, may be there deviſed, and diſtreſs made for them, without clauſe of diſtreſs. *City Law*, *P.* 4, 5.

The ordinary, *&c.* ſhall not be charged for putting their ſeal to a *will*, not knowing the ſame to be forged. *Wing. Abridg. Forging of deeds.*

A feoffment to the uſe of his *will* and to the uſe of him and his heirs, is all one.

When a man maketh a feoffment to the uſe of his *will*, he hath the uſe in the mean time. 2. If in ſuch caſe the feoffor by his *will* limit eſtates according to his power, there the eſtates take effect according to, or by force of the feoffment,

ment, and the uſe is directed by the *will*, ſo that in ſuch caſe the *will* is but declaratory. But if in ſuch caſe the feoffor by his *will* in writing deviſeth the land itſelf, as owner of the land, without any reference to his authority, there it ſhall paſs by the *will:* for the teſtator had an eſtate deviſable in him, and power alſo to limit an uſe, and had election to purſue which of them he would. *Coke's 6 Rep.* 18. *Sir Edward Clere's caſe, poſt.* 170.

Acts of parliament and *wills* ſhall take effect, although corporations, *&c.* be not rightly named, if it may be known what is meant, otherwiſe it is in deeds. *Coke's* 10 *Rep.* 57. *Chanc. of Oxford's caſe.*

The dead man's third-part muſt go according to the ſtatute of diſtributions where he dies inteſtate, viz. two-thirds to the children, and the other third to the wife, and the dead man's third not at all under controul of the cuſtom. Trin. 1718. Walſam & Skinner, 2 Vern. 559. See the Stat. 11 Geo. 1. ch. 18 ſect. 17 & 2 Wms. 527.

By the cuſtom of *London* a freeman's widow may require a third-part of his perſonal eſtate, after debts and funerals paid and diſcharged, and his children may require another third-part thereof; and he may by *will* give away another third-part of his eſtate; and, if he have no children, the widow may require a moiety of his perſonal eſtate. But if a freeman die without a *will*; adminiſtration ſhall be granted to his wife, and he ſhall claim one third-part by the cuſtom, and one third-part muſt be divided among the children, and the other third-part between the wife and children; and uſually the woman is allowed two thirds thereof. *Privilegia Londini* 279, *See Eq. Ca. Abr. chap.* 23.

A freeman by his laſt *will* cannot prejudice his wife concerning her third-part, yet in his life-time he may give them away. *Privilegia Londini, ſo.* 123.

The

The cuſtom of *London* is, that if the father advance any of his children with any part of his goods, *that* ſhall bar them to demand any other part of his goods; unleſs the father under his hand, or in his *Laſt-Will*, do expreſs and declare, that it was but in part of advancement; and then that child ſo partly advanced ſhall put his part in hotch-pot with the executors and widow, and have a full third-part of the whole, accounting that which was formerly given him as part thereof. And this is that in effect which the civilians call, *Collatio Bonorum. Coke's* 1 *Inſt.* 176. *B. Trin.* 1699. *Chace & Box, Hill.* 1704 *Bright & Smith.*

In the ſtatute 22 *Car.* 2. *cap.* 10. for ſettlement of inteſtates eſtates, is a proviſo for ſaving the cuſtom of *London*, *&c.* and thereupon it was adjudged in the caſe of *Percival*, an executrix, againſt *Criſpe*, that the third-part of the goods of a citizen of *London*, dying inteſtate, appertaining by the cuſtom to his adminiſtrator, is not ſubject to diſtribution by the ſaid act of 22 Car. 2. *Privilegia Londini* 154. *and* Sir *Thomas Jones's Rep.* 204. *Stat.* 1 *Jac.* 2.

The laws of the realm, and the judges, who are interpreters of the ſame, do favour *wills*, deviſes and teſtaments, in yielding to them ſuch a reaſonable conſtruction as they think might beſt agree with the minds of the dead.

The fee-ſimple of the copy-hold being limited to the uſe of the *will* of the copyholder, doth remain in the copyholder, and not in the Lord. *Coke's* 4 *Rep.* 24. *Copyhold caſes.*

By *will* an eſtate of inheritance may paſs without theſe words *his heirs*: as if a man deviſe ten acres to another, and that he ſhall pay to his executors ten pounds; hereby the deviſee hath a fee-ſimple by the intent of the deviſor, albeit it be not to the value of the land. So it is if a man deviſe lands to a man *imperpetuum*, or to give or to ſell, or *in Feodo ſimplici*, or to him and to his aſſigns for ever. In theſe caſes a fee-ſimple doth paſs by the intent of the deviſor; but if the deviſe be to a man and his aſſigns without ſaying (for ever,) the deviſee hath but an eſtate for life. If a man deviſe land to one, *& Sanguini ſuo*, that is a fee-ſimple; but if it be *Semini ſuo*, it is an eſtate-tail. *Coke's 1 Inſt. 9 B.*

Note; When any one intends to plead any thing againſt the validity of a teſtament, they ought to do it at the time of proving it, or within a year after; unleſs they were at ſuch time infants, or in travel beyond the ſeas, ſo as they could hear nothing of it, and then they ſhall have ſix months after they return from travel to plead againſt it, and the minors a year after they come to full age: and if ſuch parties exceed their limited times, then they are excluded from any remedy, unleſs it be in caſe where the teſtament was not at firſt proved in form of law, but after the common form; for then they muſt cauſe the teſtament to be proved over again, at any time within ten years, and alledge what they can againſt it. *Refor. Leg. Eccleſ. Tit. de Teſtamentis, cap. 6.*

Alſo,

Alſo, if any ſhall exhibit a falſe teſtament, or any ways pervert a true teſtament, by adding, diminiſhing, changing or interlining the ſame, and is openly convinced of ſuch crime; they ſhall be thereby excluded from all benefit accruing to them by ſuch teſtament. *Ibid. cap.* 39. Vide ante p. 242.

Where the teſtator hath made two teſtaments, a former and a latter, and afterwards lying ſick they are both brought unto him; and being deſired to ſhew which he intends ſhall ſtand, and he ſaith, that the firſt ſhould be his laſt *will*; or if he take that of the firſt date, and deliver it for his *laſt will*, then in ſuch caſe that *will* ſhall ſtand, and the other ſhall be void. *Perkins ſect.* 479. *Mich.* 44 *E.* 3. *fol.* 33. *Pacis Conſultum, p.* 81.

Likewiſe if an executor be named in the firſt teſtament, and none in the ſecond *will*, then the firſt teſtament ſhall ſtand, and the latter ſhall be added only by way of codicil. *Swinb. part* 7. *ſect.* 14. *num.* 5. Vide hic ante p. 3.

If a man be ſo extreme ſick that he is almoſt at the point of death, and can ſcarce ſpeak; yet if he be of good underſtanding and found mind, as may appear by his geſtures and ſenſible ſpeeches; in ſuch caſe he may make his teſtament, ſo as it come of his own accord, and not at the earneſt requeſt or importunity of his wife or ſome covetous perſon, who expects benefit of the ſame. See *Swinburn, part* 2. *ſect* 25. Vide Cro. Jac. 497 He ought to make it by his own directions, and not by queſtions. Sty. 427.

If the friends of ſuch a ſick man, or any other perſons, do without his knowledge prepare a *will* in writing, and bring it to him, and read it, and aſk him if that ſhall ſtand for his teſtament, and he anſwers yes, and immediately after dieth: in this caſe ſuch teſtament is not good, unleſs the teſtator had firſt uttered his mind to the writer or indicter thereof, or had requeſted them to write his *will*; or unleſs the teſtator being of perfect mind and memory had by plain and expreſs words, or other apparent conjectures, confirmed the ſame, and not only by anſwering yea. *Swinb. part* 2. *ſect.* 25. *num.* 11.

Though a man have ſworn not to make a teſtament, yet notwithſtanding he may lawfully make one; and if he have made one, and ſworn not to revoke it, yet he may afterwards make another, and revoke the firſt; but then it is convenient that he revoke his oath alſo, and ſay I make this my laſt *will* and *teſtament*, notwithſtanding my former teſtament, with the oath therein contained not to revoke the ſame. *Swinb. part* 2. *ſect* 24.

Counteſs of Portland and Prodgers. c. 2 Vern. 104. Cro. Eliz. 27. Cro. Car. 219, 376, 597. Mich. 8 Jac. Graun's caſe. Rol. Abr. 608. 1 Mod. 211, 212. 2 Mod. 172, 173.

A married woman cannot make her teſtament of any manors, lands tenements or hereditaments, by the ſtatute of 34 *H.* 8. neither can ſhe make a teſtament of goods or chattels without her huſband's licence, except ſhe be a queen or empreſs, or that ſhe were executrix for ſome other perſon: for in ſuch caſe ſhe may make her *will* of ſuch goods as ſhe hath as executrix

34 & 35 H. 8. cap. 5. Wills or teſtaments of manors, lands, &c. made by feme-coverts, infants, idiots, or perſons of non ſane memory, ſhall not be good in law.

with-

without his licence, and name her executor, who ſhall have them to the uſe of the firſt teſtator, but ſhe cannot give them away as a legacy; and if ſhe die without *will*, yet in ſuch caſe ſuch goods as ſhe had as executrix (of which the property is not altered) ſhall not go to the huſband, but adminiſtration thereof ſhall be committed to the next of kin to the firſt teſtator. But in both theſe caſes the huſband ſhall have the profits ariſing of the ſame; as calves, lambs, and ſuch like profit of kine and ſheep. Alſo, if the wife have goods by way of legacy from another perſon, in ſuch caſe ſhe cannot make a teſtament, or diſpoſe of the ſame without his licenſe. Note; Though the huſband do give licence to a wife to give away part of his goods, yet notwithſtanding he may countermand her teſtament again, either before or after her death, or at leaſt before the probate thereof. But if the wife make her teſtament of his goods, and the executors prove the ſame, and the huſband delivers the goods to the executors, then he cannot countermand the teſtament, though the wife made it without his licence or knowledge. For by this after-act the law preſumes he gave conſent at the firſt. 34, 35 *H.* 8. *c.* 5. *Bract. lib.* 2. *c.* 26, *Vide ante from* 197 *to* 203.

A wife, whoſe huſband is baniſhed for life by act of parliament, may make a *will*, and in every thing act as a feme ſole; and the legatees under the Lady Sandys, whoſe huſband, was ſo baniſhed, in the caſe 2 Vern. 104. were decreed their legacies.

One that is blind may make a nuncupative teſtament, by declaring his *will* before a ſufficient number of witneſſes, but he cannot make his teſtament in writing; unleſs the ſame be read before witneſſes and then acknowledged by him to be his laſt *will* and *teſtament*; for if

he ſhould acknowledge a writing for his laſt *will*, and do not hear it read, this will not make it amount to a *will* in writing. *Swinb. part* 2. *ſect* 11. and *num.* 1, 2.

By 29 Car. 2. cap. 3. No *will* in writing of any perſonal eſtate ſhall be repealed by words only, except the ſame be, in the life of the teſtator, committed to writing, and read to him, and allowed by him, and that proved by three witneſſes, ſect. 22.

A codicil may be added by parol to a *will* in writing, and this parol codicil ſhall be put in writing, and affixed to the *will* as a codicil; and this may as well be done, as a *will* in writing may be revoked by parol, concerning goods in the life of the teſtator. *Hil.* 22 *Car.* 1. *& Paſch.* 23 *Car.* 1. in *B. R. Vide ſtat.* 29 *Car.* 2. *c.* 3. *Againſt frauds amd perjuries.*

And the uſual form of a codicil is as followeth, *viz.*

Be it known unto all men by theſe preſents, That whereas I A. B. *of* C. &c. *have made and declared my laſt* will *and* teſtament *in writing, bearing date,* &c. *I the ſaid* A. B. *by this preſent codicil do confirm and ratify my ſaid* laſt will *and* teſtament, *and do give and bequeath unto* D. E. *of* F. *my,* &c. *And my will and meaning is, that this codicil or ſchedule be, and be adjudged to be part and parcel of my laſt* will *and* teſtament; *and that all things herein contained and mentioned be faithfully and truly performed, and as fully and amply in every reſpect, as if the ſame were ſo declared and ſet down in my laſt* will *and* teſtament. *In witneſs whereof I the ſaid* A. B. *have hereunto ſet my hand and ſeal this day of*
Anno Domini 17—

Where

Where and how perſons inhabiting in the province of *York*, and in *Wales*, may by *will* diſpoſe of their perſonal eſtates, ſee the ſtatutes 4 and 5 *W. & M. cap.* 2. and 7 & 8 *W.* 3. *cap.* 38. and hereafter in *Executors.*

By 2 Ann. cap. 5. the privilege given by 4 & 5 W. & M. to diſpoſe of their perſonal eſtates as they think fit, is extended to the city of York, excepted out of the act of W. & M. Where *wills* are to be proved and adminiſtrations granted.

All *wills* and *teſtaments* are proved and recorded either with the regiſter of, 1. The prerogative. 2. The proper dioceſs. 3. the peculiar: or 4. The viſitant for the preſent.

In all caſes where the deceaſed hath or had goods, chattels, credits, or other perſonal eſtate, to the value of five pounds or upwards, at the time of his deceaſe, out of the dioceſe where he lived, and was reſident or died, the *will* of the deceaſed is proved and recorded in the *Prerogative* for the whole eſtate. The records of the *Prerogative* court, are as ancient as *Septimo* Richardi *Secundi*, *Anno Domini* 1383. And it hath none more ancient as appears by their kalenders, which are with very good order made up and diſpoſed. For all ſuch *wills* as are of more antiquity, you ſhall ſearch for them with the general regiſter of the archbiſhop, in whoſe office both theſe buſineſſes were carried till the diviſion of the ſame, made at the time aforeſaid.

The ſame rules and obſervations are to be held in matter of adminiſtration of goods, *&c.*

In caſe where the whole perſonal eſtate of the deceaſed doth or did, at the time of his deceaſe, remain or be within the dioceſs where he lived, and was reſident or died; ſo that the value of five pounds, or upwards thereof, is not or was not

not (at ſuch time) in any other dioceſs; the *will* of ſuch deceaſed is proved and recorded in the proper dioceſs, with the regiſter of the archdeacon, or his official of courſe, or the commiſſary.

And in the biſhop's *Viſitation*, with his chancellor or commiſſary, with reſervation only to the peculiars, together with the benefit of general viſitation.

Note, That by reaſon of the familiarity between the biſhop's commiſſary and the archdeacon, commonly you may find *wills*, not being of prerogative nature, ſo ſoon (ſometimes) with the one as the other.

The like rule is of adminiſtrations in the dioceſs.

Only Note, That ſometimes you ſhall find *wills* proved, and adminiſtration granted, in ſeveral dioceſſes *(quoad)* unto ſeveral parts or parcels of the eſtate of the deceaſed, lying and being at the time of his death ſo ſeparated and divided: And ſometime thoſe which of right are proved, or granted and recorded in the prerogative, to be likewiſe called to be proved or recorded in the proper dioceſs.

For ſuch *wills* as fall in time of viſitation, either of the archbiſhop or biſhop of the dioceſs, you muſt ſearch for them according to the rule of their times, and years of their *Viſitation*, wherein they are very certain.

Heretofore, when the pope had power of viſitation in *England*, he took likewiſe probate of

of *wills*, *&c.* which may be very well now miſſing *inter alia.*

You may note, That there be ſome *wills* of the deceaſed, which cannot be found with the regiſter of any court chriſtian, and yet are extant in the chapel of the rolls of chancery, or the tower, in their offices *poſt mortem.* Where ſome *wills* may be found.

And laſtly, ſome *wills* which cannot be found either with the regiſter of court chriſtian, or in chancery, may (in caſe, *inter alia*, where the deceaſed hath deviſed any thing to any ſociety or body politick) be found inrolled in the houſe, college, hoſpital, hall, abbey, *&c.* to whom ſuch things were deviſed, or amongſt the records of ſuch ſocieties diſſolved, or amongſt the evidences of ſuch, unto whom the ſame things ſo given have ſince come, if you purſue the ſame.

A *will* which doth only concern lands ought to be proved in the chancery; but if it be a mixt *will*, and concerns lands, goods and chattels, it may be proved in the ſpiritual court. Probate in chancery, in what caſe.

Probate of a *will* of lands in the ſpiritual court, is no evidence at the common law; the witneſſes being there examined, their examinations ſhall not be given in evidence at common law. *Cro. Car.* 396. *Netter's caſe.* 1 *Bulſt.* 199. *Semain's caſe.* So that the heir cannot be prejudiced by ſuch probate of a mixt *will.*

A *will* of lands need not be proved in the ſpiritual court but a *will* of goods muſt be proved there otherwiſe he can bring no action. *Cro. Car.* 165. In the caſe of Hill & Thornton a conſultation was granted to proceed quoad bona.

Executors come to prove a *will*, the ordinary muſt do it *ex communi jure*; but if other exe-

executors come to prove a latter *will*, it muſt be *per Teſtes*. *Hetley*, *p.* 77.

A nuncupative *will* is not pleadable in any court before probate. *Caſes in chancery* 192. *Verborn* againſt *Brewin and others*.

A perpetual injunction accorded againſt the defendant not to prove a *will*, touching a perſonal eſtate only in the prerogative court. But note, That in this caſe it was directed by the court of chancery to be tried, whether a *will* or no; and it was found againſt the *will*, and then the injunction was awarded, *Caſes in chanc.* 86. *Beverſham* againſt *Springold*.

2 R. 3. 3. Vid. 1 Vern. 330. 2 Vern. 209. Cotton & Cotton.

If a man make a *will* and deviſe of his lands, and after diſagreeing to it, he makes a feoffment, and taketh back an eſtate in fee, and dieth: this land ſhall deſcend to the heir, and ſhall not paſs to the deviſee without expreſs agreement, that his mind was that his former *will* ſhould take place. *Lib. Aſſ.* 44. *Dyer* 143. *Pl.* 55. 44 *Ed.* 3. 33.

A man made a feoffment to perform his laſt *will*, and his *will* was annexed to the charter of feoffment, and livery of ſeiſin thereupon made accordingly: it was adjudged, that he might alter and revoke this *will*, although it took effect by the livery. *Dyer* 49. *Pl.* 12.

A. obtains a judgment in debt, he makes his wife and two daughters his executrixes, and dies, the wife alone proves the *will*, reſerving the power of adminiſtring to the two daughters when they come in; the wife alone may ſue a *Scire facias*, ſhe averring, that both the daugh-

daughters are under the age of ſeventeen. 1 *Modern Rep.* 297.

If a *will* be proved before the metropolitan, where there is not *Bona notabilia*, and ſo it ought not to be proved there, yet it ſtandeth good till it be reverſed by ſome ſentence of appeal; but if it be proved in any inferior court where it ought not, it is meerly void. *Coke's* 8 *Rep.* 136. *Co.* 5 *Rep.* 30. *Co.* 1 *Rep.* 150.

For the metropolitan hath juriſdiction over all the dioceſſes within his province. Vide infra p. 118. ſupra p. 46.

By a canon law made, 1 *Jac. c.* 19. If one die inteſtate in a journey, the goods he hath then about him ſhall not give the archbiſhop prerogative to grant adminiſtration there.

It is the proper juriſdiction of the ſpiritual court to determine at what age an infant may make a *will*, and an executor of his goods, and if that court gives ſentence againſt the law, the party grieved may have remedy by appeal, and not by prohibition. *Jones* 210. *Brown's caſe. Vide ante p* 213, 214.

The age of 14 is now allowed there and in Chancery.

The huſband may diſpoſe of his wife's *Paraphernalia* by his *will*; and if he doth not, they go to his ſurviving wife; but ſhe cannot take them without his executor's aſſent, unleſs the huſband by his *will* eſpecially appoint that ſhe may take them without ſuch aſſent. *Cro. Car.* 343. Lord *Haſtings* againſt *Douglaſs.*

If he does not, ſhe may claim them (in caſe there be no debts). Agreed in 2 Vern. 246.

Ejectment, and upon *Non Cul.* ſpecial verdict found that *Edward King* was ſeiſed of the tenements in queſtion in fee, and 29 *Nov.* 1679. Deviſed them to his daughters, *Diana* and *Suſan*, and their heirs, and that the *will* was duly

2 Vent. 350. 1 Show. 89. 3 Mod. 206, 218, 220, 259. 1 Sid. 90. 315, 362. 2 Sid. 75. Raym. 225, 240, 334. Ow. 70. 2 Danv. Abr. 529.

Golds. 33. Cro. El. 306. Cro. Car. 51, 52. Cro. Jac. 115, 497.

made

made and ſigned, according to the ſtatute of frauds and purjuries, and the name *Edw. King* ſubſcribed at the bottom of the *will*; and they found that *Edw. King* afterwards having intention to revoke the *will quoad Dianam*, who was married, and her portion paid to the leſſor, directed the following words to be ſubſcribed upon the ſame *will.* viz. *We whoſe names are under written do teſtify, That the above-named* Ewd. King *did, the day of the date hereof, publiſh and declare, that the ſeveral clauſes and deviſes in his* will, *any way relating to his Daughter* Diana, *ſhould ceaſe and be void, ſhe being ſince married, and her portion paid. In witneſs whereof we have hereunto ſet our hands this* 28*th of* October 1680. J. S. J. D. F. N. *and* G. W. And that the ſaid words were writ under the ſaid teſtament upon the ſame paper by the direction of the ſaid *Edw. King*, and ſubſcribed by the ſaid four witneſſes in his preſence: but they further found that the ſaid writing ſo as aforeſaid ſubſcribed, was not ſubſcribed by the ſaid *Edw. King*, or any other, by his direction, or his authoriſing. And that after the death of *Edw. King*, *Diana* and her huſband entered and demiſed to the plaintiff, and if the defendant were guilty, they found for a moiety for the plaintiff, and for a moiety for the defendant. And note, That the words of revocation were writ upon the ſame paper, and the ſame ſide of the paper upon which the *will* was written, but under it immediately under the name *Edw. King* ſubſcribed to the *will.* And if this revocation, as to *Diana*, was good acccording to the ſaid ſta-

tute

tute of frauds and perjuries, not being ſubſcribed by *Edw. King*, was the queſtion. And note, The clauſe for making of *wills* directs all *wills* to be ſubſcribed by the teſtator; or ſome other in his preſence, and by his direction, and atteſted by three or four witneſſes, and ſubſcribed in his preſence. And the clauſe touching revocations ſaith, that no deviſe ſhall be revocable, but by ſome other *will* or codicil in writing, or other writing declaring the ſame, or by cancelling, *&c.* by the teſtator himſelf, or in his preſence, or by his direction; but all deviſes ſhall remain good till revoked or altered by ſome other *will* or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or four witneſſes declaring the ſame; any former law to the contrary notwithſtanding. And upon the firſt argument, *North*, chief juſtice, and *Levinz*, held, that foraſmuch as the deviſor's intent appeared plainly in writing, and ſo no doubt of fraud or perjury, that the ſubſcribing by *King* upon the ſame paper ſhall ſerve for the whole; and it is not material whether it be ſigned in the top or bottom of the *will* or writing: for the ſtatute doth not ſay *ſubſcribed* but *ſigned* by the teſtator. But in another term, *North* being removed into chancery, and *Levinz* ſick, rule was given for judgment for the plaintiff of the moiety, by *Pemberton* then chief juſtice, and *Windham* and *Charlton*, *Niſi cauſa* at another day, at which day *Levinz* then being preſent, day was given to another day the next term, and if any be entered *Quære*. *Levinz* 3 *part*

29 Car. 2. cap. 3. ſect. 6.

part 86. *Hilton* verſus *King*, *Hil.* 34. *Car.* 2. *in* B. R.

Deviſe of a poſſibility not made good in equity.

Doctor *Berry* ſeized in fee, by *will* deviſed the land in queſtion to ſerjeant *Fountaine*, and his heirs in truſt. 1. To ſell part for payment of his debts. 2. Till the debts paid, to pay 100*l. per Annum* to his natural daughter *Mary*, and after the debts paid 300*l. per Annum* for her life; and, if ſhe have children, to convey ſucceſſively to thoſe children: if ſons, at their full age; if daughters, to them all; but ſo, as the huſband ſhe marries, take the name of *Berry*. 3. For want of ſuch iſſue, or if ſuch iſſue die without iſſue, he deviſes *Hemſworth* and *Kingly* park, the lands principally in queſtion, to be conveyed to the eldeſt ſon and heir of his nephew *John Cater*, and the heirs of ſuch eldeſt ſon; and gives the ſaid eldeſt ſon an annuity of 40*l. per Annum*, till ſuch eſtate ſhall come to him: but if he claim any thing during the life of *Mary*, or any of her iſſue, then both father and ſon to be excluded from having any thing out of his eſtate. The eldeſt ſon of *John Cater* was *Anthony*, who had two ſiſters, the defendants *Bradſhaw* and *Todd*, Daughters of *John*. *Anthony* died, and left iſſue *John* his ſon, who in the life of *Mary* deviſed the lands in queſtion to the plaintiff, and died without iſſue. *Mary* after died without iſſue: the heir of *Fountaine* conveyed the lands in queſtion to *Bradſhaw* and *Todd*, ſiſters of *Anthony*, and heirs of him and alſo of his father *John*. *Biſhop* brings this bill to have the lands conveyed to him, ſuppoſing the equity to have this eſtate was veſted in *Anthony*, and

ſo

ſo well deviſed to him by *John* the ſon and heir of *Anthony*. But the lord keeper, aſſiſted by the chief juſtice *Treby*, and *Powell* baron of the exchequer, after ſeveral arguments and long conſideration of the authorities cited on both ſides, reſolved, that *John* had no eſtate deviſable, but a meer poſſibility during the life of *Mary*, or any of her iſſue, and ſo the deviſe to the plaintiff void, and the lands well conveyed to the defendants *Bradſhaw* and *Todd*, ſiſters and heirs of *Anthony*, and diſmiſſed the bill, but without coſts, provided he *acquieſce*, and give them no farther trouble in this court. *Levinz* 3 *part* 427. *Biſhop* verſus *Fountaine*, *Bradſhaw* and *Todd*, *in cancellar'*. 7 W. 3.

Error upon a Judgment in ejectment, where upon ſpecial verdict the caſe was, *Robert Berager* had iſſue his firſt ſon *William*, who had iſſue the wife of the leſſor, and a ſecond ſon *Robert*, who had alſo a ſon *Robert*, grandſon to the firſt *Robert*. *Robert* the grand-father deviſed the lands in queſtion in theſe words; *I give my land in Tilling to my ſon* Robert *and his heirs*; *and I give to my grandſon* Robert 50 *l*. *Alſo I give to my great grand daughter* J. S. 100 *l*. *Robert* the ſecond ſon dieth in the life of his father, after which *Robert* the deviſor made a codicil, by which he deviſeth part of the lands which he had deviſed to *Robert* his ſon to *Judith* his daughter, and after that he republiſhed his *will* by word without writing; and ſaid, that *Robert* my grandſon ſhall have or take by my laſt *will* as *Robert* my ſon ſhould have done and afterwards died. And the queſtion was, if

Robert the grandſon, being the defendant in the ejectment, and alſo here, ſhould have the land by virtue of this *will* and republication, or the wife of the leſſor, daughter and heir of *William* the firſt ſon. And it was adjudged in the common pleas, by the opinions of *North* chief juſtice, *Atkins* and *Windham*, againſt the opinion of *Scrogs*, that *Robert* the grandſon ſhould have it. And now it was argued that this judgment was erroneous, becauſe that, 1. Grandſon and ſon are different names of appellation, and denote different perſons. 2. Lands may not paſs by *will*, unleſs it be in writing. 3. The deviſor himſelf took notice in his *will* of the difference between ſon, grandſon, and great grandſon, and made deviſes to ſeveral perſons by theſe ſeveral names. 4. The republication by word would not ſupply the defect of this *will* which being of lands ought to be in writing. 5. The republication itſelf took notice of the diverſity of the appellations, *ſcil.* My grandſon *Robert* ſhall have, *&c.* as my ſon *Robert* ſhould have had. It was agreed, that the republication would aid a *will*, if words are in it capable to be aided. As the Lord *Cheney*'s caſe, a deviſe to *William*, and he had two *Williams*, it might be averred which *William* was intended, becauſe the word *William* was in the *will*: and 3 *Cro.* 493. *Beckford* and *Parnecote*, a deviſe of all his lands in *Aldworth* and after the *will* he purchaſed others, and then republiſhed the *will*; all paſs, becauſe words ſufficient in the *will*. But here he hath the word grandſon in the *will* in writing, and this caſe is all one with *Bret*

Cro. El. 493. Beckford v. arnecote.

and

and *Rigden's caſe*, *Plowd. Com.* and *Hartrop's caſe*, 3 *Cro.* 243. and the opinion of *Popham* and *Farmer*, in *Fuller* and *Fuller's caſe*, 3 *Cro.* 422, 423. is denied by the other two judges there, *ſcil Gaudy* and *Clench*, and the caſe their adjudged in another point. But for the defendant in the error it was ſaid, here is a good foundation in the words of the *will*, and the intention of them may be ſupplied by matter *dehors*. *Grand* is no other than an addition to *ſon*, for to diſtinguiſh between ſon and grandſon, both being in life at the time of making the *will*; but when the ſon was dead, as he was at the time of the republiation, the grandſon might well be underſtood by the name of ſon. And if a man hath no ſon, but a grandſon named *Robert*, and deviſeth lands to his ſon *Robert*, the grandſon ſhall take them, according to the opinion of *Walmſley*. *Owen* 88. And here, although that at the making of the *will* he had a ſon *Robert* and a grandſon *Robert*, yet at the republication, which is a new making of the *will*, he had only a grandſon *Robert*; he taketh it by the name of ſon, ſo long as the name of baptiſm is rightly expreſſed, and there is no other to take it. *Scroggs*, then chief juſtice in *B. R.* held to his former opinion which he held in *C. B.* and ſaid, that he was not at any time ſatisfied with the judgment there, and that the judgment ought to be reverſed. *Dolben*, juſtice, *ſemble contre*, *cæteri nil dixerunt*, *et adjornatur*. But after, as *Levinz* heard by others, the judgment was reverſed. *Levinz* 2 *part* 243. *Strode* v. *Berager*.

Bret and Rigden, Trin 10 El. Plow. Com. 345. Hartop's caſe, in Curia Wardor' was not reſolved, Cr. El. 243. but a Melius Inquirendum awarded, becauſe office was not fully found. Trin. 33 El.

Fuller v. Fulley Cro El. 422. Mich. 37 & 38 El.

See 1 Vent. 341. 1 Mod. 267 2 Mod. 313.

5 Mod. 74, 75. 2 Salk. 689. 513, 534.

Hawkins, being a priſoner in *Newgate* for opprobrious words againſt the mayor of *London*, and under ſome diſtemper of mind, but having great perſonal eſtate to the value of 10,000*l.* made his *will* there, atteſted by ſeveral witneſſes; and upon hearing the cauſe in the prerogative court, ſentence being there againſt the *will*, and adminiſtration committed, the cauſe came by appeal before the delegates at *Serjeant's-Inn* in *Fleet-ſtreet*, *ſcil.* *Lloyd* Biſhop of *Litchfield*, *Lloyd* Biſhop of St. *Aſaph*, *Treby* Chief Juſtice of the Common Pleas, *Rokes*, *by* Juſtice, *de eadem Cur'*, and *John Powel*, junior, one of the Barons of the Exchequer, Dr. *Oxenden*, and other civilians; where, for avoiding of the teſtimoney of two witneſſes to the *will*, were produced two records, by which they were found ſeverally convict; the one, for publiſhing a Libel; the other, for ſinging a ſong againſt the government, and both adjudged to the pillory. But no proof was that they were put into the pillory, but only the records produced. And after their examination in the eccleſiaſtical court, but before the ſentence there, came the general pardon by which they were pardoned. And the queſtion was here, whether their examination and teſtimony given in the eccleſiaſtical court ſhould be admitted for evidence? And 1. It was admitted, that they being convict, and adjudged to the pillory at the time when they gave their teſtimony in the eccleſiaſtical court, the pardon afterwards doth not make their teſtimoney good, if it were not good when it was firſt taken. 2. That the judgment of pillory made the infamy, although that they were not

2 Wilſon 18.

2 Wilſon 18. contra.

at

at any time put in the pillory. But 3. The great queſtion of the caſe was, whether the conviction and judgment for theſe crimes ſhall make them infamous, and deſtroy their teſtimony, notwithſtanding the judgment of the pillory? For it was ſaid of the one part, that the books, as *Britton*, *Co.* 3 *Inſt.* &c. which ſpeak of the infamy by the judgment of the pillory, ſpeak of the judgment of the pillory for ſuch crimes which import deceit and fraud; as cheats, &c. and that it is from the nature of the crime that the infamy ariſes, and not from the judgment. To which it was anſwered, that it is the judgment upon which the infamy ariſeth, and not from the nature of the crime. And if one be convict of cheating, yet he may be a witneſs if he hath not judgment of the pillory for it. Secondly, it is ſaid, that pillory, although it infer infamy by the common law, yet by the canon and civil law (by which they are to be adjudged in this caſe of a *will*) doth not import infamy, unleſs the cauſe for which they are adjudged be infamous; and to that the civilians ſeemed to agree. And after the council were withdrawn, for this cauſe only, as *Rokeſby* and *Powel* afterwards ſaid to *Levinz*, the matter not being infamous by the canon and civil law, the depoſitions of the witneſſes were admitted for evidence notwithſtanding the judgment of the pillory, *Per tout le Court*: and the ſentence in the prerogative court reverſed, and the *will* ſentenced to be good. *Levinz* 3 *part* 426. *Chater & alii* verſus *Hawkins*, *executor of Hawkins*. *Trin.* 7 W. 3. *Before the court of delegates at Serjeant's-Inn, in Fleet-ſtreet.*

And now having ſupplied what I have found neceſſary to direct teſtators in the due and legal forming of their *wills* and teſtaments, we are next in courſe to direct the true and regular execution and performing of them: which leads us to treat concerning

Executors.

EXecutor, is when a man makes his teſtament and laſt *will*, and therein nameth the perſon that ſhall execute his teſtament, that is his executor; and is as much in the civil law as *Hæres Deſignatus* or *Teſtamentarius*, as to debts, goods and chattels. And ſuch an executor ſhall have an action againſt every debtor of his teſtator: and if the executor hath aſſets, every one to whom the teſtator was indebted ſhall have an action againſt him, if he have an obligation or ſpecialty; but in every caſe where the teſtator might wage his law, no action lies againſt the executor. *Termes del Ley verb.* executor. *Vide hic ante p.* 2. *ante Wentw. p.* 3.

Aſſumpſit lies againſt the executor, there being no wager in that.

F.N.B. 193. E. g. F.N.B. 87. Vide ante p. 85.

Executors may bring a writ of treſpaſs for cattle, corn, *&c.* taken of the teſtator's. *F. N. B.* where you may ſee the writ.

Action of accompt lieth for, but not againſt executors. *F. N. B.* 257. *Engliſh.*

If he accepts the executorship, Hawk. Abr. 352.

Where the obligor makes the obligee his executor, though the action be gone, the executor may retain. *Coke's* 1 *Inſt. En le Table. Coke's* 1 *Inſt.* 264. *b. Vide ante p.* 143.

The teſtator and executor are *Correlativa*; and therefore if a leaſe for life be made to the teſtator, the remainder to his executor for years, the chattel ſhall veſt in the leſſee himſelf, as well

well as if it had been limited to him and his executor. *Coke's* 1 *Inſt.* 54. *b.*

If guardian in ſocage make his executors and die, the heir being within the age of fourteen, the executor ſhall not have the wardſhip but another, the next friend, to whom the inheritance cannot deſcend. *Coke's* 1 *Inſt.* 90. *a.*

For the guardian in ſocage had the wardſhip to the uſe of the heir, otherwiſe of guardian in chivalry, whoſe executors ſhall have it, for he had it to his own uſe.

Funeral expences, according to the quality of the deceaſed, are to be allowed out of the goods, before any other debt or duty whatſoever; for that is *Opus Pium* & *Charitativum*, *Coke's* 3 *Inſt.* 202. *Vide ante p.* 130.

Devaſtaverunt Bona Teſtatoris, is when the executors will deliver legacies, or make reſtitution for wrongs done by their teſtator, or pay his debts due upon contracts or ſpecialties, whoſe days of payment are not yet come, *&c.* and keep not ſufficient in their hands to diſcharge thoſe debts upon record or ſpecialties, which they are compellable by the law to ſatisfy in the firſt place; then they ſhall be conſtrained to pay theſe out of their own goods, according to the value of what they voluntarily delivered or paid.

Vide ante p. 132 & exinde.

And where a judgment recovered in the King's court ſhall be ſatisfied before a recognizance, *&c.* And if the ordinary have goods of the inteſtate by ſequeſtration, and an action of debt to the value of the goods is brought againſt him; as ordinary he ſhall not diſpoſe or adminiſter theſe goods to any other, but is bound to ſatisfy the debt, for which action is firſt brought. *Termes del Ley.*

And judgments are to be paid before recognizances, ſtatute-merchant or ſtaple, for they are more puiſne. *Vide Co.* 4. *Rep.* 60. *Caſe*

of the wardens, &c. of ſadlers, and the *ſtat.* 34 & 36 *E.* 3. and 2 *E.* 6. concerning theſe matters.

Infant may adminiſter at 17, but cannot commit Devaſtavit till his full age. 1 Vern. 328. His aſſent to a legacy good, if ſufficient aſſent; ſecus not 1 Chan. Ca. 256.

Upon payment and ſatisfaction to an infant-executor, he may acquit and diſcharge, otherwiſe not; for if it ſhould be good, it would be a *Devaſtavit*: But if a feme-covert be executrix ſhe cannot releaſe; for ſhe may do nothing to the prejudice of her huſband, but the releaſe of the huſband is good. *Coke's* 5 *Rep.* 27. *Ruſſel's caſe. Co. Lit.* 172. *Vide ante p.* 217 & *poſt.* 53.

Vide ante p. 195. If an executor promiſe to pay a debt of the teſtator's and have no aſſets in his hands at time of the promiſe, and if there be no debt, he may give the ſame in evidence, and probably have thereby remedy againſt his promiſe. *Coke's* 9 *Rep* 94. *Will. Bane's caſe.*

Where it is fraud to pay part of money due upon a recognizance, and yet keep the recognizance in force, *vide Coke's* 9 *Rep. Meriel Treſham's caſe*, 108.

When judgment is given againſt executors, and the ſheriff returneth *Nulla Bona, &c.* upon the *Scire facias*, the plaintiff may have a ſpecial writ of *Fieri facias, ſil.* That the ſheriff levy the debt of the goods of the dead, *Et. ſi ſibi conſtare poterit*, that the executors have waſted the goods, then *de bonis propriis. Coke's* 5 *Rep.* 32. *Pettifer's caſe.*

Vide ante p. 40. If there be three executors named in the teſtament, and two refuſe, the third may prove the *will* alone, and yet the other two may meddle with the goods when they will, and either of them when they will: And if an action be brought, it ought to be brought in all their names notwithſtanding ſuch refuſal. *Touchſtone of precedents* 29.

If

If one executor be cited and refuſe, yet he may afterwards adminiſter at his pleaſure; the like if more refuſe: but if all refuſe before the ordinary, and the ordinary commit adminiſtration to another, there they cannot afterwards adminiſter. And the executor who proveth the *will* muſt name the other executors in all actions for debts, and they may releaſe the whole debt; and they that refuſe ſhall have an action by ſurvivor. And in actions againſt them, all executors muſt be named, although the *will* be not proved. *Coke's* 9 *Rep.* 37, 78. *Henſloe's caſe.* *Infra p.* 51.

The probate of *wills* by common law belonging to temporal courts, and in ſome places in *England* the lords in their courts, as court-baron, or other courts have probate of *wills*; and the executors have a temporal right and intereſt by the *wills*, and the probate giveth them no right or title: but the judges are not willing to admit them to bring actions without ſhewing the *will* duly proved under ſeal of the ordinary: but the proving by one executor is ſufficient for all. *Coke's* 9 *Rep.* 34, 35, 36, 37, 38, 39, 40. *Henſloe's caſe.*

Two executors prove the *will*, the third refuſeth, yet he may releaſe. *Coke's* 5 *Rep.* 28. *Middleton's caſe.*

The King may make his teſtament, as it was aſſented in full parliament; and the executors of *Hen.* 4. refuſing, the archbiſhop of *Canterbury* was to grant adminiſtration of the ſame: and when the King is made executor, he doth appoint others to execute the ſame, (againſt whom ſuch as have cauſe of ſuit may bring their action) and appointeth others to take the accompt. *Coke's* 4 *Inſt.* 335.

If

At law if one had refuſed to ſell, the others could not ſell; but now by 21 H. 8. c. 4. tho' part of thoſe to whom ſuch power is deviſed refuſe, the reſt may ſell; and ſo may ſuch of thoſe to whom land is deviſed to be ſold, who are willing tho' the others refuſe, by a favourable conſtruction of that ſtatute. Hawk. Abr. 170.

If a man deviſe that his executors may ſell his land, here they have but a power or bare authority, and they muſt all join; and if one die, or refuſe, the other cannot ſell; but if a man deviſe lands to one for life, and after his deceaſe that his land ſhall be ſold by his executors, there it is otherwiſe, becauſe they could not ſell the land ſooner; but there, if the executors were particularly named, then the ſurvivors could not ſell. But if a man deviſe his lands to his executors to be ſold, there, as they have an intereſt or eſtate which doth ſurvive, their power ſhall likewiſe ſurvive, and the ſurvivors may ſell. *Coke's* 1 *Inſt.* 112, 113.

If a man deviſe that his executors ſhall ſell his land, there the land ſhall deſcend to the heir, and he ſhall take the profits in the mean time; but if a man deviſeth his tenements to be ſold by his executors, or his tenements to his executors to be ſold, there the deſcent is taken from the heir, and the executor ſhall have the mean profits till ſale, which ſhall not be aſſets in their hands; but therefore they are compellable to ſell the lands ſo ſoon as poſſible. *Coke's* 1 *Inſt.* 236. *a. Vide poſt.* 54.

If a copyholder ſurrenders his copyhold-lands to the uſe of his *will*, and afterwards by his *will* duly executed, doth order and direct that two perſons, or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor ſhall make ſale of ſuch copyhold-lands, and apply and diſpoſe of the moneys ariſing thereby, for the intents and purpoſes in his ſaid *will* mentioned; they may ſell the copyhold-lands

without being admitted tenants thereof; and the lord ſhall admit the yendee, and ſhall have but one fine. *Holder* on the demiſe of *Sulyard*, Eſq; v. *Preſton*, *C. B.* 2 *Wilſon*, 400.

In debt by executors, if one demandant or plaintiff be nonſuit, and the other ſueth forward, he who is nonſuit ſhall not be amerced. *Coke's 8 Rep.* 61. *Beecher's caſe.*

The heir ſhall not have an action of debt upon an obligation, but the executors. *F. N. B.* 266. *in an obligation to one and his heirs.* F. N. B. Eng.

They may likewiſe bring action for arrear of an annuity in fee. *Ibid.*

Leſſee of a manor for life dieth, his executors ſhall have debt for arrearages of the rent. *F. N. B.* 290. *Eng.*

They may have execution upon a ſtatute. *F. N. B.* 267. *Eng.*

May bring a writ of covenant. *F. N. B.* 323, 324. *Eng. Covenant for a perſonal thing.*

A *Certiorari* lies to them to certify the conuſance of a fine. *F. N. B.* 328. And an *alias pluries, and attachment againſt the judge's executors.*

An executor before probate may releaſe an action, (yet he can have no action) becauſe the right of action is not in him. *Coke's 1 Inſt.* 292. *b. Vide ante Wentw. p.* 34.

Where executors of a biſhop ſhall have a ward which fell in the life of the biſhop, otherwiſe of a preſentation to a church which voided in his life. *Coke's 1 Inſt.* 388.

Where an infant at 17 makes the debtor his executor, the debt is extinct. *Ibid.* 264. For as the law gives the infant power to make an executor, it gives his executor the ſame advantages with others. Hawk. 351.

Execu-

Executors ſhall not have execution of the judgment, or recognizance, in the time of the teſtator within the year without ſuing a *Scire facias*; but otherwiſe it is of a ſtatute, *&c. Coke's* 2 *Inſt.* 395.

Where by ſtatutes action of accompt lieth for executors, adminiſtrators, and executors of executors, *vide Coke's* 2 *Inſt.* 404.

The heir or executors, according to the caſe, ſhall have a writ of error upon a bill of exception. *Coke's* 2 *Inſt.* 427.

If parſon or prebend dieth, his executors ſhall have an action of debt for arrearages incurred in the life of the teſtator: and the like if the parſon or prebend reſign, he ſhall have action for the arrearages of an annuity, becauſe the perſon of him who is to pay the annuity is chargeable, but otherwiſe it is in caſe of a rent, be it rent-ſervice, rent-charge, or rent-ſecke. *F.N.B.* 268.*Eng.*

If a woman be endowed of rent, or if rent be granted for life, and the tenant attorn, the rent is behind, and after the particular eſtate is determined by death, the executors of tenant in dower, or of the grantee for life ſhall have an action of debt by the common law, becauſe by poſſibility the teſtator himſelf might have an action of debt; for if he had ſurrendered his eſtate to him in the reverſion, he ſhould have an action of debt for the arrearages incurred before. *Coke's* 4 *Rep.* 49, 50. *Ognel's caſe.*

If a man hath or ſhall have, in right of his wife, any eſtate in fee-ſimple, fee-tail, or for term of life, of or in any rents, or fee-farms, which ſhall be unpaid in the wife's life, the huſband after

after the deceaſe of his wife, his executors or adminiſtrators, ſhall have action of debt for the ſaid arrearages againſt the tenant of the demeſne that ought to have paid the ſame, his executors or adminiſtrators; and alſo my diſtrein for the ſame by force of the ſtat. 32 *H.* 8. *cap.* 37. *Coke's* 4 *Rep.* 49, 50, 51. *Audrew Ognel's caſe.*

In all caſes where action is brought by one as executor, although it be for rent arrear, or other matter grown due in their time, yet the writ ſhall be in the *Detinet* only: but when an executor or adminiſtrator taketh the profits nothing ſhall be aſſets, but the profits above the rent reſerved; and therefore in ſuch caſe the writ ſhall be for rent in the *Debet & Detinet.* *Coke's* 5 *Rep.* 31. *Hargrave's caſe.* Vide ante p. 87. 147.

If executor bring an action as adminiſtrator, he may be barred as to the action of the writ: but yet miſtaking of his action is no bar, nor eſtoppel to bring his true action. *Coke's* 5 *Rep.* 33. *Robinſon's caſe.*

If a man by deed grant a rent for life, proviſo that he ſhall not charge his perſon, this is a good proviſo; yet if the rent be behind, and grantee die, his executors ſhall charge the perſon of the grantor in an action of debt, for otherwiſe they ſhould be without remedy; and therefore it is now become repugnant, and by conſequence void. *Coke's* 6 *Rep.* 41. *Sir Anthony Mildmay's caſe.* *Co. Lit.* 146.

If a man make leaſe *pur auter vie*, of land in two counties rendring rent, and the rent is behind, *& Ceſtuy que vie* dieth, the leſſor ſhall have an action of debt in which of the counties he will, and ſo may his executors, for now it is changed into an action of debt; and in that caſe no

no land ſhall be put in view, but the perſon of the debtor ſhall be only charged by the common law: And the like, if a rent be iſſuing out of land in two counties.

Executors ſhall have an action for rent behind againſt the grantor, and ſeveral feoffees, for the rent behind in each of their times. *Coke's 7 Rep. 39. Lillingſton's Caſe.*

A Man profeſſed is dead in law.

If *A.* be bound to the abbot of *D*; *A.* is profeſſed a monk in the ſame abbey, and after is made abbot thereof; he ſhall have an action of debt againſt his own executors. *Coke's 1 Inſt. 133. b.*

If the marriage of the feme executrix ſhould be a releaſe, it would be a devaſtavit which an act in law never works.

Where a feme executrix take the debtor to huſband, notwithſtanding the debt remains; if feme obligee take the debtor to huſband, this is a releaſe in law. The like if two femes obligees, and one take the obligor to huſband. *Coke's 1 Inſt 264. b.*

Action for an eſcape lieth not againſt the gaoler's executors, becauſe it is a treſpaſs. 2 *Inſt.* 382. *Vide ante, p.* 127.

If I deliver goods to one who is indebted to me, and he dies, againſt his executors I may have a writ for the goods, and for the debt; becauſe that the writ is againſt the executor for the debt in the *detinet*, and for the detinue it is in the *detinet*: and therefore the writ well warrants the count to declare partly for debt, and partly for detinue; but ſuch action he could not have had againſt the teſtator, becauſe againſt him in debt the writ ought to have been in the *debet & detinet. Touchſtone of Precedents* 40.

In caſe of an executor, though the plea be multiplied, or double, yet good; for one may anſwer to every thing alledged by him. 21, 22 *Car. 2. Jefferys verſ. Dod.*

If

If executor of leſſee for years aſſign over his term, an action of debt doth not lie againſt him for rent due after the aſſignment; the like if the leſſee aſſign over his intereſt and die: But if he aſſign but Part of the matter or land granted it is otherwiſe, and in ſome caſes it ſhall be apportioned. *Coke's 3 Rep.* 24. *Walker's Caſe.*

Where he in remainder, and not the executor of tenant for life, ſhall be charged by diſtreſs for rent arrear in the life-time of tenant for life. *Coke's 5 Rep.* 118. *Edriche's Caſe.*

Where executors of a perſon outlawed may ſatisfy, and then take advantage of the king's pardon, but not before in the Caſe of a ſubject, where executors ſhall have attaint, by Stat. 6 *Ed.* 6. Reſtitution upon Stat. 21 *H.* 8. Adminiſtrator ſhall have a Writ of Error upon ſtat, 27 *Eliz. Coke's 6 Rep.* 80. *Sir Edward Phitton's Caſe. Vide ante, p.* 101.

In Replevin executor or others need not alledge ſeiſin in making avowry for rent; for the deed is the title, and no ſeiſin need be alledged, unleſs forced by an old ſtatute of limitation. *Coke's 8 Rep. Sir William Foſter's Caſe,* 65.

It is a maxim in law, that executors ſhall not be charged with a ſimple contract, nor with a debt for meat and drink of the teſtator, although it be of neceſſity. [and for which an infant ſhall be bound as for his neceſſarys,] Nor the executors of the Lord for ſurpluſage of accompt before auditors; nor in an action upon the caſe upon *Aſſumpſit*, which is a perſonal action, and dieth with the perſon; becauſe where the teſtator

Vide ante p. May he charged in *Aſſumpſit*; for in *Aſſumpſit* no wager is allowed, ſo this paragraph is not law.

tator might have waged his law, no action lies againſt the executors. *Coke's* 9 *Rep.* 87. *Pinchon's Caſe.*

Vide ante p. 122. But the lieutenant of the tower may bring his action againſt the executors of a priſoner for treaſon dying there, for the meat and drink provided for ſuch priſoner. The like of any other gaoler; for the gaoler is bound to find meat and drink for his priſoner, and in ſuch caſe the priſoner cannot wage his law. *Ibid.*

The like difference is between a labourer, and limner of books; for the labourer is compellable to ſerve, but the limner not; and therefore 'twas his fault he did not take a ſpecialty upon his agreement. *Coke's* 9 *Rep.* 88. *Pinchon's Caſe.* But actions upon the caſe *ſur Aſſumpſit* do well lie againſt executors. *Ibid.* 90.

Action of accompt lies not againſt executors, but only for the King. *Coke's* 1 *Inſt.* 90. *b. Coke's* 11 *Rep. Earl of Devonſ. Caſe.*

If a man make a leaſe for life to one, the remainder to his executors for 21 years, the term for years ſhall veſt in him preſently, for even as anceſtor and heir are correlatives (*viz.*) one cannot be named without relation to the other as to the inheritance: as if an eſtate for life be made to *A.* the remainder to *B.* in tail, the remainder to the right heirs of *A.* The fee is veſted in *A.* as it had been limited to him and his heirs; even ſo are the teſtators and executors *Correlativa* as to any chattel: and therefore if a leaſe for life to be to the teſtator, the remainder to his executors for years, the chattel ſhall veſt in the leſſee himſelf, as well as if it had been limited to him and his executors. *Coke's* 1 *Inſt.* 54. *b.* *Vide hic ante p.* 37.

The

The executors do more actually repreſent the perſon of the teſtator, than the heir doth the anceſtor; for if a man bindeth himſelf, his executors are bound, though they be not named; but ſo it is not of the heir; and ſo of adminiſtrator, and ordinary alſo. *Coke's* 1 *Inſt.* 209. *a.*

And though the executor be not named, yet the law appoints him to receive money due or owing to the teſtator: but ſo doth not the law appoint the heir to receive the money unleſs he be named. *Coke's* 1 *Inſt.* 209. *b.* 210. *a.*

If mortgage be to pay the money to the mortgagee, or his heirs, the mortgager cannot pay the money to the executors of the mortgagee: for the law will never ſeek out a perſon where the parties themſelves have appointed one; *Et in hoc Caſu Deſignatio unius Perſonæ eſt Excluſio alterius, & expreſſum facit ceſſare tacitum.* But if the condition be to pay money to the mortgagee, his heirs or executors, the mortgager hath election to pay it either to the heir or executors. *Coke's* 1 *Inſt.* 210. *a.*

If feoffment be upon condition to pay money to the feoffor, or his heirs or aſſigns, at ſuch a day, and before the day feoffor makes his executor and dies, the feoffee may pay the money either to the heir or executors, for they are his aſſigns in law as to this intent. But if a feoffment be made upon condition that if the feoffor pay to the feoffee his heirs or aſſigns 20 *l.* before ſuch a feaſt, and before the feaſt the feoffee maketh his executors and dieth, the feoffor ought to pay the money to the heir, and

not to the executors, for the executors in this caſe are no aſſigns in law. *Coke's* 1 *Inſt.* 210. *a.*

But if the feoffee make a feoffment over, the feoffor may pay the money either to the firſt feoffee, or to the ſecond feoffee: and ſo if the feoffee dieth, he may pay it either to the heir of the firſt feoffee, or to the ſecond feoffee. *Ibid.*

Executors have judgment in an accompt, and have the defendant in execution for arrearages: now the teſtament is annulled, for that the teſtator was an idiot, and the record ſpiritual was removed into the chancery by writ, and ſent into the *King's Bench*, where the action was brought; and thereupon the defendant brought an *Audita Querela*; and adjudged it did well lie. *Coke's* 8 *Rep.* 144 Dr. *Drurie's Caſe. Dier.* 203. *b.*

The Lady *Pawlet*, tenant for life, made a leaſe for 99 years, if ſhe lived ſo long, yielding 100 *l.* at the feaſts of St. *Michael* and the Annunciation, or within forty days after; the leſſee made his wife executrix and died, the Lady afterwards made her executor, and died the thirteenth day after St. *Michael:* her executor brought action for the rent due at *Michaelmas*; but the court was againſt the plaintiff. *Coke's* 10 *Rep.* 129. *William Clun's caſe.*

Vide ante p. 134. Every executor is an adminiſtrator of goods, and the pleading is, *Ne unques Executor, Nec unques adminiſtravit come Executor.* And an adminiſtrator hath the office and quality of an executor. *Coke's* 5 *Rep.* 83. *Snelling's caſe.*

If an executor or adminiſtrator plead payment, or recovery of other debts in bar to an

action; if it be by covin, it ſhall be no bar to a juſt debt. *Coke's* 8 *Rep.* 133. *Turner's caſe.*

The defendant pleads, Fully adminiſtred; the plaintiff replies, that he had aſſets; the jurors find aſſets to 172 *l.* judgment to recover the whole debt of 200*l.* and coſts and damages of the goods of the teſtator, if, *&c.* and if not, then damages of his own goods. *Coke's* 8. *Rep.* 134. *Mary Shipley's caſe.* See 1 Lev. 286. 2 Saund. 214. 1 Sid. 448. 2 Keb. 606, 631, 666, 671. 1 Vent. 94.

Note: The plaintiff upon this bar might have prayed judgment preſently, for thereby he confeſſeth the debt; but he cannot have execution till the defendant have goods of the deceaſed. *Ibid.*

An executor of his own wrong ſhall not retain, for thereof will enſue great inconvenience. *Coke's* 5 *Rep.* 30. *Coulter's caſe. Cro. El.* 630. Vide plea p. 55 & ante 181.

When a man dieth inteſtate, and a ſtranger taketh his goods, or ſelleth them, in this caſe it maketh him executor of his own wrong; although the pleading be, he never was executor, or never adminiſtred as executor. Vide ante p. 172.

But when an executor is made, and he proveth the *will*, or taketh upon him the charge of the *will*, and adminiſtreth; in this caſe, if a ſtranger taketh any of the goods, or claimeth them for his proper goods, and uſeth and diſpoſeth of them as his own goods, that doth not in conſtruction of law make him an executor of his own wrong; becauſe there is an executor of right whom he may charge, and theſe goods which are taken out of his poſſeſſion after he has adminiſtred are aſſets in his hands. But although there be an executor or adminiſtrator, yet if a ſtranger take the goods, and

claiming to be executor pay debts and receive debts, or pay legacies and intermeddle as executor; there, for ſuch expreſs adminiſtration as executor, he may be charged as executor of his own wrong, although there be another executor in right. And when a ſtranger taketh the goods before the rightful executor hath taken upon him, or proved the *will*, in this caſe he may be charged as executor of his own wrong; for the rightful executor ſhall not be charged but with the goods which come to his hands, after he hath taken upon him the charge of the *will*. *Coke's* 5 *Rep.* 34. *Read's caſe.*

If a man bail goods to another, and afterwards the bailor doth releaſe to the bailee all actions, the bailee dieth; in a writ of detinue brought againſt the executors they ſhall not take advantage of this releaſe, for the ſame determineth by the death of the bailee; and the action given againſt the executors is a new action (although of the ſame nature) grounded upon their own detainer. *Coke's* 10 *Rep.* 51. *Lampet's caſe.*

By *Aſſumpſit* of the teſtator to pay a debt, or duty, an action upon the caſe lieth againſt the executors. *Coke's* 10 *Rep.* 77. *Lovies's caſe.*

If any perſon by recommending an officer to the King, or otherwiſe, be a means or inſtrument of loſs or damage to the king, he, his heirs, executors and adminiſtrators, ſhall be chargeable to the king for ſuch damage ſuſtained. *Coke's* 11 *Rep.* 91, 92. *Earl of Devonſhire's caſe.*

Where

Where *Ceſtuy que uſe* ſhall charge the executors, *&c.* for profits received by the feoffees in truſt in their life-time. *Coke's* 4 *Inſt.* 86, 87.

One executor may refuſe, and yet afterwards adminiſter or releaſe a debt, but otherwiſe it is if they all refuſe before the ordinary: and probate of *wills* in the ſpiritual court before the ordinary hath been but of late times, *&c.* and they have not the ſame by the ſpiritual laws, but *Conſuetudine Angliæ, & non de communi jure.* And after they have proved the teſtament their authority is executed, and they have not the power to take the refuſal of any, when any of the executors prove the *will.* And much more concerning the power of the ordinary in probate of *wills*, granting adminiſtration, *&c.* and the ſtatutes concerning the ſame, ſee in *Coke's* 9 *Rep.* 37, 38, 39, 49. *Henſloe's caſe.* *Supra p.* 39 *hic*, *& p.* 40 *in Wentw.*

By the common law executors could not have an action of accompt in reſpect of the privity of the accompt. But *Stat. Weſtm.* 2. *cap.* 23. giveth an action of accompt to executors; *Stat.* 25 *Ed.* 3. *cap.* 5. to executors of executors; and *Stat.* 31 *E.* 3. *cap.* 11. to adminiſtrators. Executors of the accomptant chargeable to the King by his prerogative in action of accompt; but 'tis otherwiſe in the caſe of a common perſon. *Vide Coke's* 11 *Rep. Earl of Devonſhire's caſe.*

An executor is not chargeable in an accompt where he cannot be charged in detinue; for that nothing came to his hands; nor in accompt, where the teſtator was not bound to render ac-

W. 2. c. 23. 13 Ed. 1. executors ſhall have a writ of accompt, and like action and proceſs in the ſame writ as their teſtator ſhould if he had lived. 25 Ed. 3. ſtat. 5. Executors of executors ſhall have actions of debt, accompt and of goods carried away of the firſt teſtators, and executors of ſtatutes merchant and recognizance, made unto him, and alſo ſhall anſwer to others ſo far as they ſhall recover of the firſt teſtator's goods, as the firſt executors ſhould have done 31 Ed. 3. c. 11. adminiſtrators to have an action to demand and recover, &c. and ſhall anſwer to others, &c. in the ſame manner as executors, &c.

compt, although to the King. *Vide Coke's* 11 *Rep. Earl of Devonſhire's caſe.*

By 4 & 5 Ann, c. 16. it is given.

It hath been attempted in parliament to give an action of accompt againſt the executors of a guardian in ſocage, but never could be effected. *Coke's* 1 *Inſt.* 90. *B.*

In regard of the length of time, and the loſs of books (which the defendant had ſworn by his anſwer) it was ordered, the defendant ſhould not be charged in the accompt for more than according to his own oath what was made, or he did remember or believe was made, by ſale of thoſe goods: for an accomptant having loſt his papers by no fault of his own, ſhall not be charged beyond his own oath. Yet a ſurviving factor * was to accompt for what was made by himſelf or co-factor; and in ſome caſe an accompt lies againſt the executrix for the deceaſed factor, *Caſes in Chancery* 127, 128. *Holſtcom* againſt *Rivers.*

* See S. P. Godfrey v. Saunders, Eaſter, 10 Geo. 3. 3 Wilſon in C. B.

In the caſe, *Stowel* againſt *Long*, executor to *George Long*, the Lord Keeper declared, that if the defendant's counſel had not offered to accompt he would not have ordered the defendant to accompt; for that all the money received by the profits was pardoned by the act of oblivion. *Caſes in Chancery* 173. *George Stowel* againſt *Long*, executor to *Long.*

Plea of accompt ſtated, over-ruled, although the defendant was but an executor, and pleaded, that he knew not how to accompt; but this was upon full proof that 200 *l.* was omitted in the accompt, being paid by his ſervant, and entered in his book, which he then had not. 27 *Car.* 2. *Wright & Coxon*, 1 *Chan. Ca.* 262. *Nel. Chan. Rep.* 431. *S. P.* 2 *Chan. Ca.* 157. *S. P.*

Accompt.

Accompt lies not againſt executors or adminiſtrators, becauſe they are not privy to the accompts; and a detinue lieth not for money numbred, becauſe one penny may not be known from another; and the teſtator might not wage his law againſt a bill, being ſealed and delivered as a deed.

By 4 & 5 Ann. c. 16 actions of account may be brought againſt the executors and adminiſtrators of every guardian, bailiff, and receiver, and by one joint tenant and tenant in common, his executors and adminiſtrators againſt the other, as bailiff for receiving more than his ſhare, and againſt their executors and adminiſtrators; but generally matters of accompt are moſt proper in equity.

It is clear law, that no action of accompt lieth againſt an executor or adminiſtrator, for the law doth not intend them to be privies to the accompt.

Accompt lay not againſt executors for three cauſes. Firſt, for want of privity, and for that he never was in poſſeſſion of the land, nor took any profits of it, *&c. Dyer fol.* 277. *Pla.* 59.

In all actions brought by executors ſhall be ſummons and ſeverance, becauſe the beſt ſhall be taken for the benefit of the dead: and ſo in an action of treſpaſs, as executor for goods taken out of their own poſſeſſion; and the like accompt as executor. *Co.* 1 *Inſt.* 227.

The releaſe of an infant-executor, if he receive full payment or ſatisfaction, is a good diſcharge for what he receiveth, but it is otherwiſe without payment. *Co. Lit.* 172.

Vide hic. 38, ante p. 217.

But the releaſe of feme-covert executrix is not good, for ſhe can do nothing to the prejudice of the huſband: but without queſtion the releaſe of the huſband is good. *Co. Rep. lib.* 5. *Caſes of executors, fo.* 27.

If executor do not ſell, but refuſe to make ſale, he is bound to put all the profits of the land to the uſe of the dead. *Co.* 1. *Inſt.* 236. *a.*

Aſſets in maines l'Executors, is when a man indebted makes executors, and leaves them ſuf-

Aſſets, what

ficient to pay, or ſome commodity or profit is come to them in right of their teſtator; this is called aſſets in their hands. *Termes del Ley. verb: Aſſets.*

If a man deviſe lands to his executors to be ſold, and his meaning be, that they ſhould take the profits in the mean time, then it is neceſſary that he deviſeth that the mean profits till the ſale ſhould be aſſets in their hands, for otherwiſe they ſhall not be ſo; and it is better to give them an authority than an eſtate, unleſs in ſome caſes. *Co. Lit.* 236.

Damages recovered by the executor in an action of treſpaſs ſhall be aſſets, yet they were never in the teſtator, *Co. Lit.* 124. *Vide ante p.* 69.

Where the teſtator deviſeth that his executors ſhall ſell the land, there the lands deſcend in the mean time to the heir; and until the ſale be made the heir may enter, and take the profits. But when the land is deviſed to his executor to be ſold, there the deviſe taketh away the diſcent, and veſted the eſtate of the land in the executor, and he may enter and take the profits, and make ſale according to the deviſe. And when a man deviſeth his tenements to be ſold by his executors, it is all one as if he had deviſed his tenements to his executors to be ſold; and in ſuch caſe the executor is bound to ſell ſo ſoon as he can; for that the mean profits taken before the ſale ſhall not be aſſets, and therefore he may otherwiſe take advantage of his own laches. *Co.* 1. *Inſt. fo.* 236. *ſect.* 383 *Vide. hic ante* 40.

See Holder v. Preſton 2 Wilſon 400.

Jurors may find aſſets by diſcent in any other county in *England*, and jurors may find the

the ſubſtance of the iſſue, (that is to ſay) aſſets, and the finding that they are beyond ſea is ſurpluſage: For if the executors have goods of the teſtator's in any part of the world, they ſhall be charged in reſpect of them: But it is otherwiſe in felony and other criminal caſes; for *Ubi quis delinquit ibi punietur. Co.* 6 *Rep.* 47. *Dowdale's caſe.*

Executor of his own wrong may not retain to pay himſelf, for then every creditor would contend for it; and it is not reaſonable for any to take advantage of his own wrong. And the Law of God ſaith, *Non facias malum ut inde fiat bonum, & melius eſt omnia mala pati quam malo conſentire.* Co. 5 Rep. fo. 30.

Vide hic ante P. 49. & 181. Cro. El. 630. Ireland v. Coulter.

If one hath lands for years as executor, and ſurrender the ſame, now to one reſpect the term is extinct, and to another reſpect it is in being. *Co.* 1 *Rep.* 87. *Corbet's caſe.*

Where the covenant to the teſtator was the cauſe of making the leaſe to the executors, for that cauſe the term was aſſets in the executor's hands. *Co.* 1 *Rep.* 98. *Shelley's caſe.*

Uſes and confidences to ſome reſpects were reputed chattels, and ſo were deviſable; and to other reſpects they were eſteemed as hereditaments, of which there ſhould be a *Poſſeſſio Fratris.* But yet in law, neither chattels nor hereditaments; for they were not aſſets to executors, or aſſets to the heir. *Co.* 1 *Rep.* 121. *Chudleigh's caſe. Co.* 8 *Rep.* 95. *Matt. Manning's caſe.*

When an executor or adminiſtrator taketh profits, nothing ſhall be aſſets but the clear profits. *Co.* 5 *Rep.* 31. *Hargrave's caſe.*

Goods

Vide ante p. 113.

Goods taken out of the poſſeſſion of an executor after he hath adminiſtred, are aſſets in his hands. *Co.* 5 *Rep.* 34. *Read's caſe.*

If executors plead Nothing in their hands, or heir Nothing *per diſcent*, if aſſets found, judgment ſhall be for the whole: But upon plea Nothing *per diſcent*, the plaintiff may have judgment preſently, and a *Scire facias* when aſſets do deſcend. *Co.* 8. *Rep.* 131. *to* 134. *Mary Shipley's caſe.*

Where an executor or adminiſtrator ought in pleading to confeſs the debt, but that they have not aſſets, except to ſatisfy debts of record. *Coke's* 9 *Rep.* 109. *Merial Treſham's caſe.*

Where the executors of feoffees ſhall anſwer *Ceſtuy que Uſe* of profits received by the feoffee.

A term granted to uſe of a feme-ſole, her executors and not her huſband ſhall have the uſe. *Co.* 4 *Inſt.* 85, 86, 87.

Adjudged that a term of 24 years limited to *Charles Paget* (after the death of Lord *Paget*, who had covenanted for diſcharge of funeral debts and legacies, he would ſtand ſeiſed to the uſe of *T. T.* during the life of Lord *Paget*, after to the uſe of *Charles Paget* for 24 years) was void, becauſe it wanted a good conſideration; foraſmuch as *Charles Paget*, and others, were ſtrangers to the conſiderations, *ſcil.* to the payment of his debts and legacies: But if he had made them executors, ſo that they had been chargeable to the payment of them, and ſo privy to the conſideration, then the conſideration had been good. And it was agreed, although the term was void *ab initio*, yet if the covenant had been (that after

ter the end or expiration of the ſaid 24 years, he would ſtand ſeized to the uſe of the ſon *ut ſupra*) that his ſon ſhould not have the ſame till the years be incurred: but the words being after expiration, or end of the ſaid term of 24 years, and the term imports in itſelf the eſtate and intereſt in the land; for this cauſe the term being void, the eſtate of the ſon ſhall begin preſently. *Co.* 1 *Rep.* 154. *Rector of Chedington's caſe.*

If a man hath a bare authority accompanied with a truſt, as executors have to ſell lands, they cannot ſell by attorney: But if a man hath abſolute authority as owner of the land, as *Ceſtuy que uſe* heretofore had, then it is otherwiſe. *Vide Co.* 9 *Rep.* 75. *Combe's caſe.*

One executor may aſſign a term without the other, according to the opinion of the lord chief juſtice *Holt* in *Stonor's caſe. Vide ante, p.* 98.

The writ *de Rationabili parte Bonorum* lies for the wife againſt the executors of her huſband after debts paid, and funeral expences diſcharged; and there muſt be a cuſtom alledged in ſome county, *&c.* to enable the wife or children to the ſaid writ; and ſo it hath been reſolved by parliament, 3 *E.* 3. *Detinue* 156. 40 *E.* 3. 38. But ſuch children as be reaſonably advanced by the father in his life-time, with any part of his goods, ſhall have no further part of his goods; for the words of the writ be, *Nec in vita patris promoti fuerunt.* Co. 1 Inſt. 176. *B.*

The wife of *Walter Pheaſant*, who was an orphan, had her portion in the chamber of *London*, and after marriage, *Walter* took out 40 *l.* thereof, and by *will* gives his ſaid wife her portion

portion in the chamber of *London*, being 2800 *l.* and other things to the value of 1000 *l.* on condition ſhe renounce her dower: ſhe accepts this legacy before, and after her huſband's death, the executors of the huſband exhibit their bill in chancery againſt the widow to renounce and releaſe her dower; and the widow brought a croſs bill againſt the executors of her huſband, the mayor and commonalty, and chamberlain of *London*, for her portion in the chamber of *London*, and inſiſted that her portion belonged to her, in regard the ſecurity was unaltered by her huſband in his life-time, and ſo was as much as if it were a debt due to her by bond, The Lord Keeper conceived this money in the chamber of *London* was a debt, for the chamber paid intereſt for it, and ſo the widow intitled to it; and the acceptance of a collateral ſatisfaction will not bar her dower, according to *Vernon*'s caſe. *Caſes in chancery* 181, 182, *Pheaſant's caſe.*

By the cuſtom it is to be paid at the full age or marriage of the female orphan, and it was the laches of the huſband he did not recover it; it was a Choſe in Action, and not deviſable, and Trover would not lie for it, &c. Per Cur. the injunction which was obtained to ſtay proceedings in the writ of dower was diſſolved. 2 Vent. 340. Mich. 22 Car. 2, in Canc. Pheaſant v. Pheaſant & al'; & vide poſt 79.

In the caſe of *Civil* againſt *Rich*, the queſtion was on a *will*, whereby, after other bequeſts, this clauſe was added: Item, *All the reſt of my lands, goods, and perſonal eſtate, I give to* A. B. *on truſt to give to my children and grandchildren according to their demerits.* The deviſee who was heir and executor gave the land to one, omitting the reſt; and the queſtion was, if that was a diſpoſition according to the truſt. The lord chancellor ſaid, I take it for a rule, That whereſoever there is a demand in law or equity, there muſt be a certainty of the thing demanded to be adjudged or decreed. I ſit not here to make the *wills* of men, nor to interpret them further

further than the *wills* go; and therefore as to the ſettlement of the lands on one, and not on all, I cannot alter; and ſo diſmiſſed the bill as to that. Another queſtion aroſe touching the perſonal eſtate, wherein the point was, That a citizen of *London* being reſiduary legatee dying, whether this being but a legacy, which till election reſted *prima facie* in the legatee, but as executor, ſhould be ſubject to the cuſtom as the executor's own eſtate: The lord chancellor decreed it ſhould; and ſaid, I will make election for him. *Modern caſes in chancery* 309. *Civil* againſt *Rich.*

The *will* was good if executed, but could not compel an execution at law, therefore equity ought: And as to the pretence, that there was no perſon named in the *will* to ſell, ſerjeant *Maynard* ſaid, That when the intention is clear, all means without which that cannot be attained, muſt be ſupplied by a court of juſtice, and divers precedents were cited; as *Hughs* and others againſt *Collins*, *Lockton* againſt *Lockton* and others. Where lands were decreed to be ſold, ſometimes by the heir, ſometimes by the executors, according to the intent of the party appearing, although no perſon appointed to ſell. *Caſes in chancery* 177.

The law always gives mortgage money to the executor where no perſon is named; and where the election to pay money either to the heir or executor is gone by the forfeiture in law, 'tis all one in equity as if either heir or executor were named; and then equity ought to follow the law, and give it to the executors: For in

And the money was originally parted with from the perſonal eſtate; for this vide 1 Chan. Ca. 283. 2 Chan. Ca. 50. 220. 2 Vent. 348, 351. 1 Chan. Rep. 242. 2 Chan. Rep. Co. Lit. 210.

155, 242. 1 Chan. Ca. 88. Hard. 467. 1 Vern. 170, 412.

natural

the c

natural juſtice and equity, the principal right of the mortgagee is to the money. *Caſes in chancery* 285.

In an action againſt executors upon *Aſſumpſit* of the teſtator, the plaintiff need not aver, that the defendant hath aſſets to pay legacies or debts, for that ſhall come on the defendant's part; for the law intendeth that every one will in diſcharge of his conſcience leave aſſets to pay all his debts, which he ought to pay to any one. *Co.* 9 *Rep.* 87 *to* 90. *Pinchon's caſe. Vide ante p.* 157.

He who maketh a promiſe to another, that if he will forbear to ſue one, if he do not pay, he who promiſeth will pay the money, ſhall be generally charged upon his own promiſe: So when one is executor, and maketh ſuch a promiſe, the debt is due by him in right of his executorſhip, and the promiſe is made in his own right; and therefore he ſhall be charged in an action brought upon his *Aſſumpſit* generally, yet that money ſhall be allowed him in part of his accompt as executor. *Vide Co.* 9 *Rep.* 94. *William Bane's caſe.*

Note; it is at the plaintiff's election to bring his action of debt againſt the heir, or executors.

Actions perſonal, what.

Actions perſonal, as ſuch actions whereby a man claims debt, or goods, or chattels, or damage for them, or damages for wrong done to his perſon, and is that which in the civil law is called *Actio in perſonam*, and is brought againſt him who is bound by covenant or default to grant a thing. *Terms del Ley. verb. Action perſonal.*

A

A man may join two or three things in his action, where the concluſion of his action is pertinent to the ſeveral matters, and doth not vary; as for goods, and debts againſt executors in the *Detinet*, &c. *Vide Touchſtone of Precedents.*

Note, That the time, wherein he that is named executor in the teſtament is to deliberate and determine, whether he will accept or refuſe the executorſhip, is left to the diſcretion of the ordinary, who not only within the year (allowed by the civil law) but within a month or two, may cite him to accept or refuſe the office. *Swinb. part 6. ſect. 4.*

When an executor intends to accept of the office, it behoves him to make an inventory of the teſtator's goods; for if he meddle with the goods, and refuſe to make an inventory, he may be puniſhed by the ordinary: But he may meddle with the goods as to the diſcharging of funerals, or diſpoſing of ſuch things as cannot be preſerved, and kept until the time of making the inventory. *Swinb. part 6. ſect. 6.*

Note, That the goods in the inventory ought to be particularly prized and valued according to reaſonable prizes, and not huddled up together ſeveral things in a groſs ſum; but thoſe goods which do belong to the heir after the teſtator's death, muſt not be put into the inventory; neither may thoſe goods called *Bona Paraphernalia* (which is the wife's convenient apparel agreeable to her quality) be put into the inventory: But ſuch is the general cuſtom within the province of *York*, that widows are there not only tolerated to reſerve to their own uſe their

Vide 4 & 5 W. & M. cap. 2. and 2 Ann. cap. 5.

their convenient apparel, and a convenient bed and furniture, but alſo a coffer or box, with divers things therein; as jewels, chains, borders, and other things neceſſary for their own perſons. *Swinb. part* 6. *ſect.* 9.

Certain jewels to the value of 500 marks were allowed to a viſcounteſs as her *Paraphernalia*, and accounted but a reaſonable allowance for one of her degree. *Viſcounteſs Bindon's caſe More's Rep. pag.* 72. *Pl.* 338.

But note, If the reſt of the goods will not ſuffice to pay the huſband's debts, then are the wife's jewels, chains, borders, and ſuch like, (being things of decency or ornament, but not neceſſity) to be put into the inventory amongſt other goods of the deceaſed towards the payment of his debts. *Swinb. part* 6. *ſect.* 7. *num.* 5. *in fin.*

In this caſe there were two judges againſt two. It was in trover on a ſpecial verdict for the jewels. Vide 2 Vern. 246. that he may deviſe them.

Note alſo, That the huſband may deviſe ſuch chains and jewels, *&c.* though he leave ſufficient aſſets beſides to pay his debts, and in ſuch caſe the wife ſhall not have them as her *Paraphernalia*; but if the huſband make no gift, or deviſe of them, and leave aſſets beſides to pay his debts, then the wife in ſuch caſe may keep them in deſpite of the executors or adminiſtrators. *Tr.* 8 *Car.* 1. *B. R. Lord Haſtings and Sir Archibald Douglas's caſe, Cro. Car.* 343.

If any creditor or legatary do affirm, that more goods came to the executors hands than are named in the inventory, he muſt prove it; for otherwiſe credit is to be given to the inventory. *Swinb. part* 6. *ſect.* 10.

If

If there be ſeveral excecutors, and one of them exhibits an inventory, this ſhall not charge the other in an action brought againſt them; but the party that ſues muſt prove, that ſuch executor hath actually adminiſtred, and that goods came to his hands, or elſe he ſhall not be charged. *Lent Aſſizes, apud Ebor.* 8 *Car.* 1. *Ireland's caſe, Clayton's Rep. p.* 106. *Pl.* 179.

More concerning inventories ſee in Wentworth's *Office of Executors.*

If a man be long abſent, and it be not known whether he be alive or dead, if he have made a *will* it may be proved; eſpecially if it be reported that he is dead, and that the party abſent was ſickly, and a very old man when he went away, or the like. *Swinb. part* 6. *ſect.* 13.

As there are divers words which make a conditional diſpoſition, ſo there are divers ſorts and diviſions of conditions, whereof ſome unneceſſary, ſome impoſſible, ſome poſſible or indifferent: when the condition is extreme, that is to ſay, either unneceſſary or impoſſible, ſuch a condition hindreth not the executor or legatary, but that he may be admitted to the executorſhip, or recover the legacy, as if ſuch condition had not been at all expreſſed. *Swinb. part* 4. *ſect.* 5. *num.* 4. *and ſect.* 6. *num.* 2.

But when the condition is not extreme, but indifferent or poſſible, then it muſt firſt be fulfilled before the executor be admitted, or the legatary recover his legacy; but there are di-

vers limitations to both theſe rules. *Swinb. part* 4. *ſect.* 6. *num.* 4.

If the teſtator make *A. B.* his executor or give him 100 *l.* when his ſon dies, here the executor or legatary cannot obtain the executorſhip or legacy till ſuch a thing happen, but muſt wait the event of the condition. *Ibid.*

If the teſtator make *A. B.* his executor, or give him 100 *l.* if he marries his, the teſtator's, daughter, ſuppoſing her to be living, whereas ſhe is dead; in this caſe though the condition be impoſſible, yet becauſe the teſtator did think her to be living, and therefore the condition poſſible, *A. B.* in this caſe cannot be executor, nor obtain the legacy; or if the daughter were living, but died before marriage, in ſuch caſe it is all one; but if ſhe were living, and afterwards did refuſe to marry, yet notwithſtanding *A. B.* might be admitted to the executorſhip, or obtain the legacy. *Swinb. part* 4. *ſect.* 6. *num.* 9, 14, 15.

But if the teſtator's daughter were willing afterwards to marry with *A. B.* before he have obtained the executorſhip or legacy, and then he refuſeth her; in this caſe he ought not to be admitted to the executorſhip, or obtain the legacy, unleſs after her refuſal at firſt, and before her willingneſs, he be married to another woman, or have obtained the executorſhip or legacy, and is poſſeſſed thereof; for then her repentance comes too late. *Swinb. part* 4. *ſect.* 10.

Alſo if the teſtator make *A. B.* his executor, or give him 100 *l.* if he marry his daughter, and he refuſes to marry her; here he cannot be

be admitted to the executorſhip, or obtain the legacy, although afterwards he be willing to marry her, and then ſhe will not marry him; unleſs that at ſuch time when he refuſed he were not of ſufficient age to marry: for his diſſent at that time when he could not conſent doth not hinder him, nor is it a breach of the condition. *Swinb. part* 4. *ſect.* 8.

If one make *A. B.* his executor, or give him 100 *l.* if he erect a monument within three days after the teſtator's death: in this caſe, if the executor or legatory do perform the ſame with as much ſpeed as is poſſible, it is ſufficient though it was not done within three days. *Swinb. part* 4. *ſect.* 6. *num.* 11.

If the teſtator ſhall charge his executor to whom he hath given all the reſidue of his goods, that he do ſome impoſſible act, or commit parricide, to pay then to *A. B.* 100 *l.* In this caſe he is not bound to the performance, for ſuch legacy to *A. B.* is void. *See Swinb. part* 4. *ſect.* 6. *num.* 12.

Where the teſtator makes an executor, or gives 100 *l.* if he pay 10 *l.* to *C. D.* before a certain time, within which time *C. D.* dieth; and then he payeth the 10 *l.* within the time to the executor or adminiſtrator of *C. D.* In this caſe, becauſe he did not pay the 10 *l.* to *C. D.* himſelf, he cannot be executor, nor obtain the legacy. *See Swinb. part* 4. *ſect.* 7.

But if I be made executor, or 100 *l.* is bequeathed to me, if I pay to the teſtator's ſon (being an infant) 10 *l.* In this caſe, if I pay it to the child's tutor, it is a ſufficient performance of the condition. *Ibid.*

If the teſtator makes his wife executrix, or gives her 100 *l.* if ſhe abideth with his children: in this caſe, if ſhe enter into bond to perform the condition, or elſe to make reſtitution, ſhe may then be admitted to the executorſhip, or obtain the legacy. *Swinb. part* 4. *ſect.* 9.

Alſo if the teſtator make thee executor, or give thee 100*l.* if thou never play at cards or dice, or if thou never wilt be bound for any perſon: in ſuch caſe, entring into ſufficient bonds to perform the condition, or elſe to make reſtitution, thou may'ſt then be admitted to the executorſhip, or obtain the legacy. *Vide ibid.*

Thoſe conditions which do impugn and hinder that liberty, which every teſtator ought to have by the law in the making of his will, are accounted unlawful. Therefore if the teſtator makes thee his executor, or gives thee 100*l.* if thou ſhalt make him thy executor, or give him 100 *l.* in thy teſtament; or if the teſtator makes thee executor, or gives thee 100 *l.* if *A. B.* will; or if the teſtator make ſuch a perſon executor, or give him 100 *l.* whom thou wilt appoint: in theſe caſes, though thou name one to be executor, or that *A B.* will that thou be executor, or have the legacy; yet thou ſhalt not be admitted to the executorſhip, nor have the legacy, becauſe by ſuch means that free liberty which every teſtator ought to have in the making of his teſtament, might be taken from him, and he deprived of that privilege; therefore ſuch diſpoſitions are ſaid to be captious. *Ibid. part* 4. *ſect.* 11.

If

If the teſtator makes *A. B.* executor, or gives him 100 *l.* if he never marry, or if he marry according to the appointment or conſent of ſome other perſon: the firſt of theſe conditions is unlawful, becauſe it wholly forbids marriage; and the ſecond is unlawful, becauſe it is referred to another perſon to make choice for him, who perhaps may chuſe ſuch a perſon as is very unfit for *A. B.* to marry with. Therefore, in the firſt caſe, he may be admited to the executorſhip, or obtain the legacy, as if no ſuch condition had been; and, in the ſecond caſe, *A B.* may make choice of a woman himſelf (without the appointment of the other perſon) and marry her, and then he may be admitted to the executorſhip, or obtain the legacy, but not before marriage. *Ibid. ſect.* 12.

But if the teſtator make an executor, or give him 100 *l.* if he do not marry before the age of 21 years; or if that he do not marry a widow, or ſuch a woman; or that he do not marry in ſuch a place, or city: in theſe caſes, if he do break the condition, then he loſeth all his intereſt as to the executorſhip or legacy. *Swinb. part* 4. *ſect.* 12.

If the teſtator make his wife executrix, and if ſhe will not or cannot be executrix, then he maketh his ſon executor; and if his ſon be not executor, then he maketh his ſiſter executrix; and if ſhe be not executrix, then he maketh his brother executor: in this caſe, the teſtator is ſaid to make degrees of executors; and in this example there are four degrees of executors. And obſerve always, the executor in the firſt degree

By the civil law a deviſe on condition not to marry without conſent, is void, though there be a limitation over; for there the maxim is Matrimonium eſſe liberum; but it is otherwiſe in our law, for ſuch condition is good, and there ſhall be no relief, if there be a limitation over; otherwiſe it is if only in terrorem. But a deviſe not to marry at all, or not to marry one of ſuch a profeſſion, is void by our law.
1 Vern. 20.
1 Chan. Ca. 22.
2 Chan. Rep. 23.
Nel Chan. Rep. 145.
2 Vern. 293.
2 Chan. Rep. 95.
2 Vern 357.
See 1 Wilſon 130, 135 & 3 Atk. 330, 364. touching deviſes upon condition, and in Terrorem.

(as the wife is here) is ſaid to be *inſtituted*, and the reſt *ſubſtituted*. *Swinb. part* 4. *ſect.* 19.

Note, That it is lawful for the teſtator to make as many degrees of executors as he pleaſeth, and he may ſubſtitute into the place of one executor either one or more; and into the place of many executors he may ſubſtitute one alone, or he may ſubſtitute to every executor one, or one of them to another. *Swinb. part.* 4. *ſect.* 19.

But if the teſtator do inſtitute divers executors, ſubſtituting one or more to them, ſo long as any of them which was firſt inſtituted may be executor, the ſubſtitute is not to be admitted, unleſs the teſtator do appoint to every ſuch executor a ſubſtitute; for then any one of theſe firſt inſtituted executors, not being able or refuſing to be executor, his ſubſtitute is then to be admitted with the reſt of the executors firſt inſtituted; whereas otherwiſe, any of the firſt inſtituted executors, in the firſt degree, lawfully undertaking the executorſhip, all the ſubſtitutes are excluded; and, in ſuch caſe, if the executor afterwards die inteſtate, then the adminiſtration is to be committed of the reſt of the goods of the teſtator deceaſed, not adminiſtred by the executor, except in ſome ſpecial caſes. *Swinb. part* 4. *ſect*, 19.

If the teſtator make one executor, if he give 10*l.* to *A. B.* and if he do not, then he appointeth another to be executor; though the firſt refuſe to give 10*l.* to *A. B.* yet cannot the other be executor, unleſs he give the 10*l.* to *A. B.* becauſe this condition of giving expreſſed

preſſed in the inſtitution, is underſtood to be repeated in the ſubſtitution. *Swinb. ibid.*

As to the appointing of tutors, it matters not by what form of words they are appointed, ſo that the teſtator's meaning can but appear; nor in what language the tutor is aſſigned, whether in *Engliſh*, *Latin*, *Greek*, *&c.* and it is the cuſtom in ſeveral places, that if the father appoint not a tutor by his *will* to his children, then the mother by her *will* may appoint one and if neither father nor mother appoint one; then a ſtranger (if he make the child his executor) may appoint one; and if there be no tutor teſtamentary, then the ordinary may appoint one. *Swinb. part.* 3. *ſect.* 9. 12.

It was the cuſtom of many places formerly, that a boy after he had accompliſhed the age of fourteen years, and a girl after ſhe had accompliſhed the age of twelve years, might then chuſe their own tutors if they pleaſed, and refuſe the tutors appointed them by their father's *will:* but now by the Stat. of 12 *Car.* 2. *cap.* 24. every father, whether they be of the age of 21 years, or under, may by deed executed in his life-time, or by his laſt *will* and teſtament in writing, delivered in the preſence of two or more credible witneſſes, diſpoſe of his children, under the age of 21 years, and not married at the time of his death, for and during ſuch time as they ſhall remain under the age of 21 years, or any leſſer time, to the cuſtody and tuition of any perſon or perſons in poſſeſſion or remainder, (popiſh recuſants excepted); and ſuch diſpoſition of ſuch children, ſince the 24th of *February* 1645,

or hereafter to be made, ſhall be good againſt all and every perſon and perſons claiming any ſuch child or children, as guardian in ſocage, or otherwiſe. *Ibid.* 11 & 12 *Car.* 2. *cap.* 24.

And ſuch perſon, to whom ſuch children ſhall be diſpoſed, or deviſed, may have an action of raviſhment of ward or treſpaſs againſt ſuch perſon as ſhall wrongfully take away, or detain ſuch child or children, for the recovery of them, and recover damages for the ſame in ſuch actions, for the uſe of ſuch child or children; and they are alſo impowered by the ſame act of parliament, to take into their cuſtody, to the uſe of ſuch child or children, the profits of all the lands tenements and hereditaments, of ſuch child or children, and the cuſtody and management of their goods, chattels, and perſonal eſtate, until the age of 21 years, or leſs time, according to the parents diſpoſition; and may bring an action in purſuance thereof, as by the law guardian in ſocage might do. 12 *Car.* 2. *cap.* 24.

Note, That there is a general cuſtom within the province of *York*, and in ſeveral other places that there is due to the lawful children of every man, being an inhabitant or houſholder within the ſame province (and dying there or elſewhere) a filial or child's part and portion, which is ſometimes a third-part, and ſometimes an half-part of the father's clear moveable goods, as hath been afore-ſhewed, unleſs the child be heir to his father, or were advanced by him in his life-time. Upon which exceptions there are made theſe obſervations: as if the father ſhould by his laſt *will* and teſtament forbid his child

to

to have any portion of his goods, ſuch *will* in ſuch caſes is void, and the child may notwithſtanding recover his filial part or portion: alſo, if the father ſhould leave his child but 20 *l.* when by the rate of the inventory his part comes to 100 *l.* here he might refuſe the legacy, and recover his full portion notwithſtanding the *will*: or if the father ſhould impoſe any condition upon the ſaid portion, as to be paid ſeven years after his death, or the like; yet the child may ſue for it preſently after his father's death, and recover it before the ſeven years be out: for it is preſently due upon the father's death, notwithſtanding his father's *will* to the contrary; and if the father by his *will* ſhould bequeath the portion after the child's death to any other perſon, in ſuch caſe the *will* is void, and the portion ſhall go to the executors or adminiſtrators of the child after his death. But now by Stat. 4 & 5 *W.* & *M. cap.* 2. from and after the 26th day of *March* 1693, perſons inhabiting, or who ſhall have any goods within the province of *York*, may by their laſt *wills* diſpoſe of all their perſonal eſtate as they ſhall think fit; and their widows, children, and other kindred, ſhall be barred to claim any part of the perſonal eſtate in other manner then as by their *wills* ſhall be appointed. This act ſhall not extend to the cities of *York* and *Cheſter*, who are or ſhall be freemen of the ſaid cities, inhabiting within the ſame, or the ſuburbs therefore at the time of their death. *See Stat.* 4 & 5 *W.* & *M. cap.* 2. *But by* 2 *Ann. cap.* 5. *It it is extended to the City of* York.

Alſo

Alſo by *Stat.* 7 & 8. *W.* 3. *cap.* 38, after the 24th of *June* 1696, it ſhall be lawful for any perſons inhabiting or reſiding, or who ſhall have any goods and chattels within the principality of *Wales*, or marches thereof, by their laſt *wills* and teſtaments, to give, bequeath, and diſpoſe of their goods and chattels, debts and perſonal eſtate, to their executors, or to ſuch other perſons as the teſtator ſhall think fit, as by the laws and ſtatutes of this realm may be done within any other part of the province of *Canterbury*, or elſewhere. And after the ſaid 24th day of *June*, the widows and children, and other the kindred of ſuch teſtators, ſhall be barred to claim any part of the goods and perſonal eſtate of ſuch teſtators, otherwiſe than as by the ſaid *wills* is limited and appointed; any law cuſtom, or uſage to the contrary notwithſtanding.

Provided, nothing in this act ſhall extend to take away any right or title which any woman now married, or younger children now born, may have to the reaſonable part of their huſband's or father's eſtate, by the cuſtom or uſage in *Wales*. *See the Stat.* 7 & 8 *W.* 3. *cap.* 38.

If tenant for life have hops growing, and die a little before the ſeverance of them, in this caſe the executors or adminiſtrators ſhall have them, and not he in reverſion or remainder; for the hops are accounted as emblements, they growing by manurance and induſtry of the owner, by the making of hills and ſetting of poles. *Cro.* 1 *part*, *fol.* 396. *Vide ante p.* 58.

As

Executors to pay Debts according to the following Rules

As to the payment of debts by the executor, he muſt have a care to pay them according to the following rules; otherwiſe it may be he ſhall be forced to pay ſome of the teſtator's debts out of his own proper goods, if there be not ſufficient goods of the teſtator's to pay all the debts.

Vide ante hic 37, & ante 132. to 156.

Firſt, Funeral expences; then debts to the King or Queen's majeſty; then judgments muſt be paid; after them ſtatutes-merchant and recognizances; then obligations; and if there be divers obligations, he may pay which of them he pleaſes firſt; unleſs the day of payment in one obligation be paſt, and the day of payment in the other obligation not come; for then that is to be paid firſt where the day of payment is paſt; or unleſs one obligation be put in ſuit, and the other not; for then that in ſuit muſt be firſt paid: And if there be two obligations put in ſuit by two creditors againſt the executor, then he which firſt gets judgment muſt firſt be paid; and in this caſe the executor, if he will, may ſuffer judgment in that which was laſt put in ſuit, and ſo pay him off firſt; then, after theſe obligations, ſimple bills are to be paid; then rents in arrear by the teſtator; then ſervants and head-workmen's wages; then merchants-books; and laſtly, contracts by word, in which the teſtator could not wage his law, upon which the executor may be ſued in an action upon the caſe, upon the promiſe of the teſtator. *Co.* 2 *Inſt.* 32. *Co.* 3. *Inſt.* 202. *Co.* 4 *Rep. Harriſon's caſe. Co.* 5 *Rep.* 28. *Co.* 9 *Rep.* 86.

Decree equal to judgment.

An

Vide ante Wentw. 36.

An executor may refuſe the executorſhip, but he cannot aſſign it, but his refuſal cannot be verbally, but by ſome act entered in the ſpiritual court, but there is not any certain form of renunciation; but if the meaning and intention of the renouncer appeareth it is ſufficient, without the formal words of renunciation, as *Ego dico me nolle eſſe hæredem*; and ſo it was in Sir *H. Goodier's caſe*, 1 *Leon. p.* 135. Sir *Nich. Bacon* lord chancellor, Sir *Robert Catlin* lord chief juſtice, juſtice *Southcote*, and *Gerrard*, attorney general, were made executors to Sir *R. R.* they ſent their letter to the chief officer of the prerogative court; whereas their buſineſs was ſo great they could not attend the execution of the *will*; and prayed him to grant letters of adminiſtration to *H. G.* and an entry was made in the court: *Executores teſtamenti prædicti executionem inde ſuper ſe aſſumere diſtulerant, &c.* And it was held that the renunciation was good, and the entry thereof good. *Cr. El.* 92. *Meſme caſe. Hill.* 30 *El. Broker v. Charter.*

Note; The value upon the appraiſement of goods is not binding, nor much reſpected at common law; if it be too high, it ſhall not prejudice the executor; if too low, it ſhall not advantage him, but the value found by the jury upon *Plene adminiſtravit* is binding. *Vide Raymond* 470, 471.

If the executor dies before probate, it is in law a dying inteſtate. *Hetley* 115. *Vide infra.*

Reſolved, That before the probate, *Crew*, executor of *Clark*, a creditor of *Staley*, goldſmith, might arreſt *Staley* for a debt due to *Clark*; and alſo before probate, *Crew* might have releaſed *Staley* of ſuch debt due to *Clark*, but

but *Crew* could not declare againſt *Staley* for ſuch debt, until he had proved *Clark*'s will. *Raymond* 479, 481, *The Lady Cheſter's caſe, by Hale chief juſtice. Vide ante hic* 41. *Wentw.* 33.

A. is made executor, and makes his *will*, and makes *C.* his executor, who dies before the probate of *A.*'s *will.* In this caſe *C.* dies inteſtate, *quoad* being executor to *A.* and his executor cannot be executor to *A.* but there muſt be adminiſtration *De bonis non. Cro. Jac.* 614. *Hayton & Wolf*, 19 *Jac. termino Paſc'.*

Where huſband and wife are divorced for her adultery, his releaſe after, of any debt or duty due to the wife before marriage or after, is good againſt her and her executor; but after they are divorced from the bond of marriage, ſuch releaſe made after is void. *Rolls.* 343.

Having ſpoken before concerning aſſets, it will not be improper to ſet down ſome general rules as to aſſets. 1. Debts due to the teſtator, be it by bond, ſtatute, judgment, or arrears of rent, are not aſſets to charge the executor until receipt of them; ſo all goods and chattels in action or poſſibility. *Godb.* 30. 2. Whatſoever the executor or adminiſtrator muſt be forced to ſue for, by the name of executor or adminiſtrator, it being recovered ſhall be aſſets. 3. Aſſets in the hands of one executor, ſhall be ſaid to be aſſets in the hands of all the executors. *Keil.* 51. 4. Aſſets in any part of the world, ſhall be ſaid to be aſſets in every part of the world. So in debt againſt an executor; defendant pleads *Plene adminiſtravit*; iſſue was upon aſſets. The jury found that he adminiſtred, and had aſſets in *Ireland*; and adjudged that they were aſſets

Ante p. 64. Wentw.

Ante 99.

Richardſon v. Dowell, executor of Lany, Mich. 2 Jac. Cro, Jac. 55.

aſſets here; and when they found he had aſſets, that is ſufficient, and further to ſay in *Ireland* is idle. *Cro. Jac.* 55. *Richardſon and Dowell.* 6 *Rep.* 47. 5 *Rep.* 34. *Dyer* 392. 5. Nothing regularly ſhall be ſaid to be chattels going to the executors or adminiſtrators as aſſets, but what may be attached in an aſſize, or diſtrained for rent, or forfeited by outlawry. 6. It is not requiſite that every aſſet be a thing in poſſeſſion, or in the hands of the teſtator; for a thing may be aſſets which never was in the teſtator's hands; if thoſe things come in lieu of the thing which was in the hands of the teſtator, as money for land, or other goods ſold; or if they come by reaſon of another thing which was in the hands of the teſtator as executor of goods by merchandizing with the goods of the teſtator. *Godb.* 30. So a leaſe to *A.* for life, remainder to his executors for 21 years, this term is aſſets. 7. Albeit a thing be extinct and gone, as to the executor and adminiſtrator himſelf, yet it may have its being and be accounted aſſets, as to creditors and legatees; as executor that hath a leaſe in right of the teſtator purchaſes the fee, the term is drowned, and yet it ſhall have continuance and be aſſets for that purpoſe. So if debtor make the debtee executor; ſo if one have lands for years, as executor, and ſurrender the ſame. 1 *Rep.* 87. *b.* 8. The goods and chattels of other men in the hands of the executors that were in the poſſeſſion of the teſtator, and he had no right to them, ſhall not be aſſets; as if executor recovers a rent that belongs to the heir, it ſhall not be aſſets; if the teſtator were outlawed at the time of

of his death, his goods are not aſſets, for they were none of his; but after reverſal of the outlawry they are.

Note, That ſuits in chancery are admitted for diſtribution of the ſurpluſage of inteſtate's perſonal eſtates, (after the funeral expences, debts and legacies, are fully ſatisfied) upon the ſtatutes of 22 & 23 *Car.* 2. *c.* 10. 2 *Vent.* 362. 35 & 36 *Car.* 2.

A. deviſeth his land of inheritance in fee to his executors, and their heirs, not naming the executors by their names, and he makes *M.* and *N.* his executors, though they refuſe to adminiſter or prove the *will*, yet they ſhall take the land as joint-tenants in fee; for executors is a good name of purchaſe as well as right heirs. *Moore* 806.

A. ſeiſed of land in fee, levies a fine of it to the uſe of himſelf for life, remainder to his executors till they have levied 300 *l.* out of the profits. *A.* dies, his executors ſuffer a ſtranger to hold the land, and to receive above 300 *l.* out of the profits, and after the executors of *A.* enter and leaſe the land for years. This leaſe is void, for the executors eſtate was determined by their negligence, and the words (in the deed declaring the uſes of the fine) till they have levied 300; ſhall be expounded, as if the words were, till they might conveniently have levied the ſame. *Moore* 721.

It is ſaid, that no action will lie againſt an executor for coſts given in chancery, againſt the deceaſed in a ſuit there. *Godb.* 165. For it is loſt when the party dies.

Debt

Adjudged for defendant on demurrer.

Debt lies not againſt an adminiſtrator upon an arbitrement made between the plaintiff and the inteſtate in writing, becauſe the inteſtate might have waged his law. 39 & 40 *El. Bowyer v. Garland, Cro. El.* 600.

Mich. 7 Jac. the queſtion was on the ſtatute 4 Jac. cap. 3. But here he ſued in another's right, and of matter which lay not in his conuſance.

Executor brought debt upon an obligation, defendant pleads *Non eſt factum*; and found for the defendant; yet the plaintiff ſhall not pay coſts. *Cro. Jac.* 229. *Haywarth v. Davie.*

Defendant pleads the plaintiffs were not executors, and it was ſo found, and yet he ſhall not have coſts, 1 *Brownl.* 29.

But *D.* as executor brought treſpaſs, and counts of his own poſſeſſion, plaintiff was nonſuit; the defendant ſhall have coſts upon the Stat. 23 *H.* 8. *Noy, p.* 64. *Lady Digbey's caſe*

The heir being forced to pay the debt of his anceſtor on bond, ſhall be reimburſed by the executors as far as there is perſonal aſſets. *Caſes in chancery* 74. *Armitage againſt Metcalf*, 1 *Chan Ca.* 74. *Paſ.* 18 *Car.* 2. 2 *Chan. Ca.* 5.

The delivery up of a bond by the executor, and taking a new bond to himſelf for the debt, is no converſion in equity to charge the executor with the payment of that money, though it is in law. But the executor was decreed to aſſign the ſecurity to the heir, *Caſes in chancery* 74. *Ibid.*

The overplus of the profits of a term deviſed out of an inheritance in truſt to pay debts to executor, who is alſo reſiduary legatee, belongs to the executor, and not to the heir, it being a term, and paſſeth as an intereſt. *Caſes in chancery* 98. *Gore againſt Blake.*

Executors

Executor, who was ſuggeſted to have waſted the eſtate, decreed to give ſecurity for a legacy. *Ibid.* 121. *Duncomb, an infant, againſt executor of Stint, Hill.* 2 *Car.* 2 Payable at 21 years of age.

A leaſe renewed by an executor ſhall be liable to a legacy of the teſtator's. *Caſes in Chancery* 191. *Holt againſt Holt.*

Legatee of a term ſues, and the executor no party, not good, though it is charged that the executor hath aſſented. 1 *Caſes in Chancery* 277. *More againſt Blagrave.*

Debtor executor to the teſtator decreed to pay to the deviſee of the reſidue of the eſtate, tho' it was objected, that the caſe was different from former precedents, *Caſes in Chancery* 292. *Phillips againſt Phillips.*

Infant's eſtate in the guardian's hands ought to be applied to the payment of his debts. *Caſes in Chancery* 157. *Bridget Dennis by her committee againſt Sir Thomas Badd, and others.*

Aſſent of an infant-executor to a legacy not good, if there be not other aſſets for debts. *Caſes in Chancery* 257. *Chamberlain againſt Chamberlain and others. Vide hic ante p.* 53 & 38. & *Wentw. p.* 217.

If there be no defect of aſſets in the executors hands, the heir ſhall have the mortgage money. *Caſes in Chancery* 285. *Thornborough againſt Baker and others.*

The portion of an orphan in *London* is of ſuch a nature, that if the huſband die, his widow and not his executor ſhall have it. *Caſes in Chancery* 182. *Pheaſant* againſt *Pheaſant. Vide hic ante, p.* 58.

Where and how executors and adminiſtrators, and executors of executors, ſhall be charged,

and what actions they may have. *Vide Wing' Abr. Title Executors.*

The executors or adminiſtrators are chargeable to the King's debt, if they have aſſets; the like of the heir, although not named in the recognizance, *&c. Wing' Abr. Title Court.*

The King's debtor dying, the king ſhall be ſerved before the executors. *See Magna Charta, 9 H 3. See 27 Eliz. 3.*

No action againſt an executor to charge him on a ſpecial promiſe to anſwer damages out of his own eſtate, unleſs a note thereof be in writing, ſigned by the party, or ſome by him authorized. *Stat. 29 Car. 2. ſect. 4.*

The Stat. *9 W. 3. 11.* ſhall not alter the laws as to executors or adminiſtrators, in ſuch caſes where they were not liable to pay coſts of ſuit.

If in court of record the plaintiff die after interlocutory judgment, and before final judgment, the action ſhall not abate, if the ſaid action might be originally proſecuted by his executors or adminiſtrators. The like of the defendant. *Stat. 9 W. 3. 11.*

In actions upon bond, or penal-ſum, for non-performance of covenants, the plaintiff may aſſign as many breaches as he ſhall think fit, and the jury ſhall aſſeſs damages for ſuch as he ſhall prove broken, and the like judgment ſhall be entered for the ſame as hath been uſual. And if the defendant before execution executed, ſhall pay ſuch damages and coſts, a ſtay of execution ſhall be entered upon the record; or if by execution executed the plaintiff ſhall be fully ſatisfied the damages and coſts with reaſonable

able charges, the body, lands and goods of the defendant ſhall be diſcharged, and ſatisfaction entred upon record: yet the judgment ſhall ſtand as a further ſecurity to anſwer the plaintiff, his executors, &c. for further breach of covenants in the ſame deed or writing contained, upon which the plaintiff, &c. may have *Scire facias* upon the ſaid judgment againſt the defendant, his heir, terre-tenants, executors, &c. upon which ſhall be like proceedings as before, &c. *Stat.* 8 & 9 *W.* 3. 11.

Ceſtuy que uſe declared by his *will*, that *J. S.* ſhould have as well the governing and ordering of his childeren, as the diſpoſing, letting, ſeting and ordering of his lands: whether *J. S.* might ſell the lands by theſe words was the queſtion. By the opinion of the court he might not; foraſmuch as the meaning of the deviſor might be collected, that he would that his lands ſhould be diſpoſed and ordered according to good order, and for the benefit of his children. But it ſhould be ill ordered to ſell the lands of the children. *Per Fitzh. Dyer* 26. *Pl.* 170.

A man poſſeſſed of divers dead chattels made two executors, and one of them got the goods, and diſpoſed by diſcretion divers ſums of his own proper money *in piis uſibus & operibus charitatis*; as in payment of taxes for a poor town, and in reparations of the church, &c. Which ſums amounted to more, or as much as the value of the chattels; to the intent to retain the goods of the teſtator as his own proper goods, and died poſſeſſed of the ſaid goods, and made

executors. And after his death the goods came to the hands of his executors, againſt whom the ſurviving executor brought an action of detinue for the goods aforeſaid. And the defendants pleaded theſe payments and diſpoſition of their teſtator, and the converſion of the property as above, and juſtified the detainer as the proper goods of the teſtator, for execution of the teſtament, *&c.* And it was taken for a good plea; and iſſue taken that the chattels were of greater value than the ſums above. *Dyer* 187. *Pl.* 6.

It was agreed for law, that if a man hath goods to the value of 100 *l.* and is indebted 20 *l.* and he deviſed to his wife the moiety of all his goods, to be equally divided betwixt her and his executors, and the executors pay the debt, the wife ſhall have the moiety of all the goods; that is to ſay, to the value of 50 *l.* without any defalcation for the debt, ſo as the executors have aſſets: but ſatisfaction or ſale of any parcel of the goods by the executors is good enough, and ſhall take away the diviſion of the wife in that parcel. *Dyer* 164. *Pl.* 57.

A wife, executrix of the firſt huſband, ſhall have the goods of the firſt huſband, and not the executors of the ſecond huſband, if he made no gift of them in his life-time.

Where the teſtator did give and bequeath to one of the executors (all debts and legacies paid) the reſidue of his goods to have to his proper uſe, it was good to him only. *Dyer* 331. *Pl.* 21.

Where

Where nothing paſſeth without election, there the election ought to be in the life of the parties, and the heirs or executors cannot make election: but where an eſtate paſſes immediately, there the party, his heirs or executors, may make election *when* they will. *Co.* 1 *Inſt.* 145. *a.*

The grantee of an annuity dies, his executors ſhall have action againſt the grantor for the arrears, becauſe they can have no other remedy; for diſtrein they cannot, for the eſtate in the rent is determined. *Co.* 1 *Inſt.* 146.

It is lawful for the executors to redeem the pledges of their teſtator with their own proper goods, when they have not any proper goods of the teſtator. And although they have goods which were the teſtator's, yet peradventure they have not money which was their teſtator's; and he who hath the goods in pledge will not receive goods for money: and ſo if one to whom the teſtator was indebted, will not receive goods in recompence, then it is lawful for the exetors to pay him with their own money, and retain ſo much of the goods of the teſtator; for it may be, that there may be a penalty, which will be forfeit before they can ſell the goods of the teſtator. And alſo it is reaſon, that a man ſhould have recompence for what he hath lawfully paid. *Dyer* 2 *Pl.* 6, 7. Vide ante p. 88.

There is a rule, that if debt be recovered againſt executors, who have nothing more than the debt recovered, and before executors they are impleaded by another, and ſuffer a recovery and execution thereupon, they ſhall be charged

of their own proper goods to the firſt plaintiff; for that they might have pleaded the firſt recovery; for the judgment in that caſe is, *Quod quer' recuperet debitum de bonis teſtatoris, &c.* So the goods are charged thereby, *&c. Dyer* 80. *Pl.* 53.

Scire facias againſt executors, with *Fieri facias* for to levy the debt and damages of the goods of the teſtator, *Si tant, &c. Et ſi non, tunc* damages of his own proper goods; the ſheriff returned, that the executor had not goods; to ſatisfy the debt, but that he had levied the damages of the goods of the teſtator, upon which iſſued another *Fieri Facias*, ſurmiſing, that the defendant had waſted the goods of the teſtator; upon which the ſheriff returned, that he had waſted the goods, and this was traverſed and tried, and a verdict for the plaintiff: and upon motion in arreſt of judgment it was ſtaid *per tot' Cur':* for the return upon the firſt writ was ill; for the goods of the teſtator ought to be charged with the debt, and not with the damages, if they were not ſufficient to ſatisfy both, but the damages are to be levied of the goods of the executor, for the delay; and although that the trial and verdict be upon the return of the ſecond writ, and the firſt admitted good and accepted by the plaintiff, and it is for the advantage of the defendant to have his coſts levied of the goods of the teſtator; yet all the proceeding on the ſecond writ, being founded upon the return of the firſt, which is ill, all is ill; and by the whole court the judgment was ſtay'd. *Levinz* 1 *part* 7. *Herne verſus* ———

In

In ejectment and in evidence to the jury at the bar, the caſe was, That a man poſſeſſed of a long term for years, deviſed it to his wife for life, remainder to truſtees for his ſon for life, remainder in truſt for the heirs of the body of the ſon, remainder to the right heirs of the ſon, and made his wife executrix. *Per Cur'*; The wife took the whole term as executrix in the firſt place, till ſhe agreed to the deviſe; but it being proved that ſhe ſaid, that ſhe would take the term according to the will; *per Cur'*, it was an aſſent ſufficient; and a caſe was cited where, in the like caſe, the wife ſaid, that the ſon was to have the eſtate after her; it was reſolved, a good aſſent. But then the original leaſe could not be produced, but being an ancient leaſe the grandſon of the leſſor producing a counterpart found among the other evidences of his grandfather, it was allowed for evidence, although that no witneſſes were ſubſcribed to it: for *Wyndam* juſtice ſaid, he had ſeen many deeds of the time of the reign of Queen *Elizabeth* without witneſſes; then the title being made to the term by one as adminiſtrator, and no letters of adminiſtration produced, the book of eccleſiaſtical court where it was granted being produced, in which was entered the act or order of the court for the granting of it, it was allowed good evidence. *Levinz* 1 *part* 25. *Garret v. Liſter.*

Vide ante p. 225.

Debt againſt an executor, who pleaded a judgment, and that he had not any goods except what are not ſufficient to ſatisfy the judgment; upon which the plaintiff demurred, eſpecially

All the pleas in Coke's Entries here cited are, Non habet, &c. bona & catalla, &c. præterquam bona & catalla, quæ non attingunt ad valentiam præd. 3000l. &c. or to that effect, not mentioning any ſum in their hands.

becauſe he did not ſhew what value the goods are which he hath; and now *Jones* argued, that it is ill in ſubſtance, for that upon general demurrer, as *Treſham*'s caſe is *Co.* 9. and if it be no other than form, as *Moore* and *Andrew's* caſe is, *Hob.* 133. yet being ſpecially demurred on is ill. *Cur'*; It is no other than form. *Co. Entries* 146, 148, 149, 152, 269, 617. *B.* But being ſpecially demurred on is ill. *Levinz.* 1 *part* 132. *Davies v. Davies.*

Error of a judgment in debt upon a judgment in the common pleas, where the plaintiff declared in the *Debet* and *Detinet* againſt an executor, and declared of a *Devaſtavit*, and had judgment *De bonis propriis*, and the judgment affirmed *in Banco Regis*; and in other like caſes hath been the like judgment. But between *Ent.* and *Withers*, *Mich.* 29 *Car.* 2. *B. R.* in debt upon an obligation, and count of *Devaſtavit* againſt an executor in the *Debet* and *Detinet*, it was ruled by judgment for the defendant; for the court would not allow the action over which had been before; *ſcil.* In debt upon judgment; and ſo held the court before in the time of *Hale* in the caſe of one *Horſey* and *Daniel.* *Levinz* 1 *part* 147. *Cory v. Thinne.*

Debt againſt an executor, who pleaded that *J. S.* is co-executor with him not named in the writ, judgment of the writ, but doth not aver that the other had adminiſtred; upon which the plaintiff demurred, and the plea was adjudged ill: for although when an executor ſueth, the defendant may plead another executor not named, without ſhewing that the other hath adminiſtred, for he may not know whether he hath adminiſtred or not; yet when an executor is ſued, if

he pleads another executor not named, he ought moreover to ſay that he hath adminiſtred, for that lieth in his knowledge. *Levinz* 1 *part* 161. *Swallow* v. *Emberſon*. *Vide ante*, *p.* 95. *and* 2 *Stra.* 1220.

Covenant againſt an executor upon the covenant of the teſtator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in an arreſt of the judgment, that this covenant was perſonal to the teſtator, and did not oblige the executors, but only obliged the maſter during his life to teach the apprentice; but *per Cur'*; It obliged the executors alſo, and they ought to ſee the apprentice taught his trade; and if they be not of the trade, they ought to aſſign him to another that is of the trade, ſo that he may be taught according to the covenant; and judgment was given for the plaintiff, *Levinz* 1 *part* 177. *Walker* v. *Hull*. †

Error in the exchequer chamber, upon a judgment in *B. R.* a man having a judgment made a man of full age and two infants his executors; he of full age proved the *will*, and alone brought the *Scire facias*, ſetting forth the truth of the caſe, and had judgment, of which error was brought and aſſigned, that all ought to have joined in the *Scire facias:* but by all the juſtices, upon advice with the civilians, it was not error; for the others may not prove the *will* during their nonage, and the judgment was affirmed, for the execution of the judgment ſhall not be delayed till the infant become of full age.

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† The caſe of Walker v. Hull 1 Lev. 177 is denied to be law, in the caſe of Baxter v. Burfield. 2 Stra. 1266, 1267, *Nota*,

Nota, Trin. 31 *Car.* 2 *B. R. Rot.* 1217. *inter Coleborn* v. *Right.* The executor of full age only, who had proved the *will*, brought action of debt for arrears of rent, and this case was cited and judgment for the plaintiff. *Levinz* 1 *part* 181. *Hatton* v. *Maskal.*

Assumpsit against executors upon a promise by the testator, who pleaded *Non Assumpsit*, upon which a verdict and judgment for the plaintiff; and error assigned, that it doth not appear by the plea [that the testator] *Non Assumpsit*; for it is not pleaded, That the testator; *Non Assumpsit. Cur' contra.* It shall be intended the testator; for there is not any charge of any assumption by the executor, but the testator only, and *Latch* 125. *Baker*'s case was cited, where in debt against executors upon the testator's bond, and plea, *Non est factum*, adjudged *suum* should be intended of the testator, and the judgment affirmed. *Levinz* 1 *part* 184. *Browning* v. *Litton.*

Indebit' Assumpsit against an executor for divers merchandizes sold and delivered to the testator, the defendant pleaded several judgments in actions of debt specified due by the testator upon simple contract, obligations against himself *per Non sum Informat' prout patet per separalia recorda inde*, which are yet in force, and that he hath not assets above such a sum, which is not sufficient to satisfy the judgments, and that he stood charged with them; upon which the plaintiff demurred; and the case was argued at the bar several times, and then judgment was given by the whole court for the † *plaintiff*;

† N. Judgment seems to have been given for the defendant, and this word, [plaintiff] seems to be a mistake in Levinz's Report.

and

and two exceptions where taken to the pleading. 1. To the concluſion. *Prout patet per ſeparalia recorda inde*, to the ſaid ſeveral judgments, where ſuch concluſion ought to have been to each ſeverally; and as it is pleaded it made a complicated iſſue; but *per Cur'* it is good enough, and ſhall be taken *Reddendo Singula Singulis*, and the plaintiff might plead *Nul tiel Record* to each ſeverally. 2. It is not ſaid, that the judgments were had *pro veris & juſtis debitis*, as the uſe is, and principally in this caſe it ought to be; becauſe the judgments are *per Non ſum informatus* in actions of debt which lie not againſt executors, and ſo there is appearance of colluſion: but *per Cur'* it is good enough, for it ſhall come by plea on the other part; for if they were not *pro veris debitis*, the defendant might plead it, and put the plaintiff to prove the verity of them, or might plead fraud and covin, and put the plaintiff to prove the conſideration. 3. It was ſtrongly argued by the ‡ *defendant*, that actions of debt will not lie againſt executors upon ſimple contract by the teſtator; and for that they admitted judgments againſt them in ſuch actions ſhall not have the advantage to plead thoſe judgments which they might reverſe when it pleaſed them, and that no other might be avoided or reverſed in bar of juſt debts; for by ſuch means, when they have barred the plaintiff of his debt, they might afterwards reverſe thoſe judgments, and have again or diſcharge the

† Quære, if this word [*Defendant*] ſhould not be *Plaintiffs* from the ſenſe of the argument?

money

money to their own uſe. And to this opinion *Keiling* chief juſtice, inclined upon the firſt argument in *Mich.* term; but afterwards *term. Paſch. prox.* he and *Twiſden*, *Windham* and *Morton*, all agreed, that judgment ſhould be given for the defendant; for although that they might have abated the actions, yet if they had ſo done, the plaintiffs might have charged them in other actions *ſur Aſſumpſit*, and ſo they would have put themſelves to double charge, which they are not obliged to do when the debts are true and juſt, and in their conſcience ought to be paid; and if they were not ſuch, the plaintiff might put them to prove by pleading the verity of their debts, or by pleading of fraud, or traverſing the truth of the debts, in which, if they fail, the plaintiff ſhall recover his debt, and no room for the ſuſpicion, that the plaintiff ſhould reverſe the debts and retain the money. And the old books, which hold that actions of debt lie not againſt executors upon ſimple contract, hold alſo that there was not other remedy; but the law is now otherwiſe, that although the debt upon ſimple contract may not be recovered againſt executors by action of debt, yet it may by *Aſſumpſit*. *Levinz* 1 *part* 200. *Palmer* v. *Lawſon*.

In Cancellaria, It was ſaid by *Fountaine*, ſerjeant, to have been reſolved in that court, and then admitted by the maſter of the rolls alone in court to be reaſonable, that if a man deviſe lands for payment of his debts, and make an executor, and leave a perſonal eſtate, that no part of the perſonal eſtate ſhall go to the payment of the debts; becauſe by the making of

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an executor the teſtator's intent appears, that the executor ſhould have the goods, becauſe the teſtator hath made another proviſion for the payment of his debts; but if a man diſpoſe of lands for the payment of his debts, and afterwards dieth inteſtate, the perſonal eſtate ſhall be chargeable in the hands of the adminiſtrator to the payment of his debts; for thereby more lands ſhall remain unſold for the benefit of the heir, or more of the money by the ſale of the land ſhall remain to the heir, and no intent appeareth that the adminiſtrator ſhould have any thing. *Levinz* 1 *part* 203. *Feltham* v. *Executores de Harlſton.*

Debt in the *Detinet*, and declared upon a judgment, had for himſelf againſt the defendant as adminiſtrator of *Lane* for 27 *l.* damages in *Aſſumpſit*, and 8 *l.* coſts, and ſhewed not how, if the damages, or if coſts were *de bonis ſuis propriis*, but generally *quod cum recuperaſſet* 27 *l.* for damages, and 8 *l.* for coſts. Upon which the defendant demurred generally, and pretended the declaration was inſufficient; for if it was *de bonis ſuis propriis*, as it might be for the damage upon *ne unq*; *adminiſtrator ou executor*, then it ought to be in the *Debet*; or if the coſts are *de bonis propriis*, as they ought to be, if he had not aſſets for them it ought to be in the * *Debet*; but at the day the defendant came not to maintain his demurrer, upon which judgment was given for the plaintiff. *Vide* 2 *Cro.* 545, 546. It is good in the *Detinet*, becauſe it ſhall be aſſets when it is recovered, be it the one or the other. *Levinz* 1 *part* 231. *Wheately* v. *Lane.*

* Qu. if this ought not to be Detinet. Cro. J. 1 Saund. 216.

Debt

Debt in the *Debet* and *Detinet*, upon a judgment againſt an executor, and count that he had waſted divers goods to the value of the debt, and ſhewed not the certainty of the goods waſted, the defendant demurred upon the declaration; and it was argued, That this action did not lie in the *Debet* and *Detinet*; for if ſo, it ſhould charge an executor of an executor which may not be, becauſe it is no other than a perſonal wrong. 9 *H.* 6. 9. 3 *Cro.* 530. 11 *H.* 4. 56. were cited as authorities for the defendant; to which it was anſwered, That it is more than a perſonal tort; he is charged here for having of the goods, and coverting them to his own uſe. The executors of a ſheriff ſhall not be charged for an eſcape; but if the ſheriff levy the money, and detain it, his executors ſhall be charged for it. 1 *Cro. Parkinſon* v. *Gilbert.* And to the caſe 11 *H.* 4. there is not any *Devaſtavit* laid; but to maintain this action were cited 11 *H.* 6. 7, 8, 16, 17, 18. where upon a *Devaſtavit* the executor is chargeable in the *Debet* and *Detinet* by *Strange*, *Paſton* and *Babington*, and in divers other caſes; and of ſuch opinion were all the court here, and did give judgment for the plaintiff. *Levinz* 1 *part* 255. *Wheatly* v. *Lane.*

Skelton brought debt upon a bond againſt *Elizabeth Maddox* an adminiſtratrix, who ſuffered judgment to go againſt her by default; ſhe makes her *will* and the defendant *Hawling* executor thereof, and dies; and this action upon the judgment is brought againſt *Hawling* ſuggeſting a *Devaſtavit*, *Hawling* pleads that he has fully adminiſtred the goods and effects of *Elizabeth*

beth Maddox; and to prove a *devaſtavit* the judgment by default was given in evidence at the trial; and whether a judgment by default againſt the defendant's teſtatrix, who was an adminiſtratrix, is an evidence of a *Devaſtavit*, was reſerved for the opinion of the court. After argument and time taken to conſider, the court gave judgment; that if an executor or adminiſtrator ſuffers judgment to go by default or confeſſion, and an action be brought againſt him on that judgment ſuggeſting a *devaſtavit*, he cannot plead *plene adminiſtravit*, for by the confeſſion of the judgment, or letting it go by default, he has admitted aſſets to the amount of the demand; And it is the ſame if the action on the judgment, be againſt the executor or adminiſtrator of an executor or adminiſtrator; ſo judgment was given for the plaintiff. *Skelton* v. *Hawling* executor, &c. 1 *Wilſon* 258.

* Debt againſt two as executors, they plead a judgment obtained againſt one of them as adminiſtrator; the plaintiff demurred and objected, 1. Becauſe the action and judgment is againſt him as adminiſtrator; which he might have avoided by plea in abatement, that he was executor. 2. Becauſe it was only againſt one, which lieth not without the others; to which it was anſwered

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* Debt againſt defendant as adminiſtrator of F. he pleads a recovery againſt him as executor; and beſides to ſatisfy that he has not any aſſets; and upon demurrer thereto, it was adjudged a good plea, and he ſhall not be twice charged; wherefore it was adjudged for the defendant. *Smalpeace* v. *Smalpeace*, *Mich.* 40. *El.* *Cro. El. p.* 646.

and

and reſolved, That the judgment was well pleadable in bar; and to the firſt was cited 3 *Cro.* 646. adjudged in point, and the caſe of *Wheatley* and *Lane* in this court before; and to the ſecond, 3 *Cro.* 437. And although that the action was not well brought, the defendant was not obliged to plead in abatement, and put himſelf to greater charge after that there was a true debt, and a recovery had upon the right of the debt. *Levinz* 1 *part* 261. *Parker v. Amis, &c.*

Scire facias againſt an executor upon a judgment in *Aſſumpſit* againſt the teſtator; the defendant demands *Oyer* of the judgment; upon which it appeared, That the teſtator died after verdict had by the plaintiff upon *Non aſſumpſit*, and before the day in bank (leaving the defendant his executor) and the judgment upon which the plaintiff brought the *Scire Facias* was entered in the next term upon the new ſtatute made at *Oxford*; and the defendant pleaded a debt due to him by obligation of the teſtator of 100 *l.* and a judgment by the teſtator to my Lord *Arlington*, and that he had not aſſets above 40 *l.* which he retained to ſatisfy himſelf, and the Lord *Arlington*; upon which the plaintiff demurred; and now the principal queſtion was, If this judgment to the plaintiff ſhould ſo relate, that it ſhould be to all intents as a judgment had againſt the teſtator in his life; and the caſe was argued at the bar three ſeveral times, and judgment was given for the plaintiff. *Levinz* 1 *part* 277. *Burnet v. Holden executor of Greenhill.*

1 Vent. 40.
1 Mod. 296.
2 Stra. 1220.

Debt by three executors, by attorney, of whom one of them was within age; the defendant pleaded, That he was within the age of 17 years; upon which the plaintiff demurred, and

two

two points were argued at the bar. 1. If an infant, and other executors of full age, join in an action, if the infant ought to do it *per* guardian. 2. If the infant ought to be omitted, and the ſuit only in the name of thoſe of full age: And the court being divided delivered their opinions ſeverally, but judgment was given that the defendant *Reſpondeat ouſter*. *Levinz* 1 *part* 299, *Foxwiſt v. Tremaine*.

Debt upon obligation conditioned to perform an award, and upon demurrer the caſe was ſuch, the plaintiff as executor, and the defendant, ſubmit all controverſies, *&c.* The arbitrators award, That the defendant ſhould pay to the plaintiff 300 *l.* A creditor of the teſtator attached it in the hands of the defendants, as the debt of the teſtator; and if it were attachable as the debt of the teſtator was the queſtion: For it was agreed, That it ſhould be aſſets in the hands of the plaintiff when he recovered it, the ſubmiſſion of the plaintiff being only as executor: And after argument it was agreed, That the ſum awarded was not attachable in the hands of the defendant. *Levinz* 1 *part* 306, *Horſey v. Turges*.

See the caſe of Fiſher adminiſtratrix v. Lane and others. 3 Wilſon Trin. 12 Geo. 3.

Reſolved, That an eviction being of the teſtator, he could not have heir or aſſignee of that land, but the damages ſhould be recovered by the executors, although they are not named in the covenant, for they repreſent the perſon of the teſtator. *Levinz* 2 *Rep.* 26. *Lucy v. Levington*.

Covenant againſt *Vanlore*, and all claiming under him, one claimed under him by act of parliament made after the covenant. *Levinz* 2 *part* 26, *Lucy v. Levington.*

Aſſumpſit by the plaintiff, an attorney of the court, by original, and declared *in propria perſona*, upon his privilege *ſecundum conſuetudinem curiæ*; the defendant pleaded a recognizance not ſatisfied, and alſo a judgment in debt for 5000 *l.* upon a goldſmith's note, to be paid with intereſt upon demand, and it was not paid till ſuch a time after and the intereſt amounting to 1700 *l.* the judgment againſt him was for 6700 *l.* and that he had not aſſets beyond 40 *l.* chargeable to this recognizance and judgment, and upon demurrer the plaintiff had judgment; *per tot' Cur'*. 1. The declaration was ill, declaring by privilege upon original; for the privilege of attornies is in ſuits by bill, but when they ſue by original, they ought to declare as other perſons in common, but that is only form, and remedied by the general demurrer. But 2dly, The plea is ill, pleading a judgment for intereſt, which is a *Devaſtavit* to permit it to run in arrear, and then to ſuffer judgment for it; and want of aſſets to pay it before it incur by the adminiſtrator, ſhall not be intended, not being expreſly pleaded. *Levinz* 2 *part* 40. *Seaman v. Dee, adminiſtrator de Everrad.*

A. and *B.* were bound jointly and ſeverally to *C*; *A.* made *D.* his executor and died; *D.* made *C.* the plaintiff the obligee his executor and died. *C.* the obligee brought debt upon this obligation againſt *B.* who pleaded that *A.* made *D.* his executor.

ecutor, who made the plaintiff his executor, and that the plaintiff had adminiſtred the goods of *A.*; but ſaith not to the value of the debt, nor to what value, but generally that he hath adminiſtred the goods; upon which the plaintiff demurred, and had judgment: for the obligation being joint and ſeveral, although that one of the obligors ſhall be diſcharged in this manner, yet the obligee may ſue the other, if he hath not obtained full ſatisfaction by the adminiſtration. *Levinz* 2 *part* 73. *Cock v. Croſs.*

Debt for rent, and laid the action in *London*, ſuppoſing the leaſe to be made there of lands in *Oxfordſhire*, and that leſſee entered and died, and the defendant entered as executor, and brought the action in the *Debet* and *Detinet*; and upon demurrer upon the declaration, judgment againſt the plaintiff: for although that the defendant is ſued as executor, he is charged as aſſignee in the *Debet* and *Detinet* upon the privity of the eſtate, not upon the privity of contract; and the action ought to be brought where the land lieth. *Levinz* 2 *part* 80 *Cormel* v. *Liſſet.*

This caſe was tried before *Hale*, at the *Guildhall*, after the end of the term; an executor waſted the goods of the teſtator, and died leaving aſſets and the defendant his executor; and if he ſhall be charged for the aſſets was the queſtion? and *Hale* held it was a perſonal wrong which died with him that did it; but upon the importunity of *Saunders*, of council for the plaintiff, he permitted it to be found ſpecially; and in another term it was adjudged according to the opinion of *Hale per tot' Cur'*. *Levinz* 2 *part* 110. *Brown v. Collins. Vide ante* 163.

See 1 Wilſon 153. and ante 12, 93.

But in the caſe of an executor of his own wrong, it was adjudged contrary. *Levinz* 2 *part* 133. *Aſtry v. Nevit.*

Error of a judgment *in Aſſumpſit* againſt the defendant an executor, where the plaintiff declared, that whereas the teſtator was indebted to him, the defendant aſſumed that in conſideration the plaintiff had at the requeſt of the defendant accompted with him, upon which he was ſo much in arrear, the defendant then promiſed to pay it; the plaintiff there had judgment *de propriis bonis* of the executor, and aſſigned it for error; but reſolved it to be no error: for the plaintiff was not bound to accompt with the executor, and he did it at the requeſt of the executor; and by *Hale*, although that a bare account will not bind an executor to pay *de bonis propriis*, yet a promiſe upon conſideration of forbearance would; and the caſe here is all one; for it ought to be intended that an expreſs requeſt was made to accompt, and upon that an expreſs promiſe to pay; otherwiſe the evidence would not maintain the declaration; upon which the judgment was affirmed *per tout le Court*. *Levinz* 2. *part* 122. *Hawes v. Smith.*

Debt upon an obligation againſt baron and feme executors, and counts upon a *Devaſtavit* by them, and upon demurrer, judgment againſt the plaintiff. 1. Becauſe the feme covert can not commit waſte during the coverture, although that the waſte of the huſband ſhall charge her if ſhe ſurvive, according to *Beaumont* and *Long*'s caſe, and 1 *Cro. Mounſon* and *Bourne*'s caſe. 2. They [the court] would not carry this action further than they have done, that is to ſay, to debt upon a judg-

Mich. 14 Car. Cro. Car. Mounſon & ux' v. Bourn, p. 518, 526.

a judgment, but not to debt upon an obligation, and between *Eaſt v. Withers*, it was adjudged, that debt doth not lie upon an obligation againſt an executor counting of a *Devaſtavit* *Levinz* 2 *part* 145. *Horſey v. Daniel.*

Debt upon an obligation againſt the defendant as executor, and count upon a *Devaſtavit*; the defendant pleaded ſeveral judgments, and that he had not aſſets above 5 *l.* chargeable to the judgments, and not ſufficient to ſatisfy them; upon which the plaintiff demurred, and upon argument judgment for the defendant; for the action in the *Devaſtavit* againſt an executor upon an obligation doth not lie: although that in an action upon a judgment and count of a *Devaſtavit* it well lieth; upon which the plaintiff prayed leave to diſcontinue, and had it. *Levinz* 2 *part* 209. *Eut v. Withens.*

Judgment againſt baron and feme executors, *Quod recuperent debitum de bonis*, omitting *teſtatoris*, and damages *de bonis le Baron propriis*; in debt upon the judgment declaring of a *Devaſtavit*, it was reſolved, that although the firſt judgment is ill, yet it is good to maintain this action till it be reverſed; for the advantage of the error ſhall not be taken ſo long as it remains unreverſed. But 2dly, It was adjudged that this action lieth not; for although that the wife, if ſhe ſurvive, ſhall be charged for the waſte committed by her huſband, yet ſhe ſhall not be charged for the coſts recovered againſt the huſband *de bonis propriis*; for which upon demurrer, judgment for the defendant. *Levinz* 2 *part* 161, *Horſey v. Daniel.*

Aſſumpſit, and declared that the defendant accounted with him being executor to *J. S.* as executor, upon which accompt ſo much was due, and he promiſed to pay it; and upon *Non Aſſumpſit* the plaintiff was nonſuited; and the queſtion was, if he ſhould pay coſts; and *Wild* held, that he ought to pay coſts, becauſe he did not ſue as executor, nor produced the teſtament, but founded the action upon an accompt with himſelf. *Rainsford* chief juſtice, *Twiſden* and *Jones contra*; for the action is in the right of his executorſhip, and the money to be recovered ſhould be aſſets, and they gave judgment accordingly. *Levinz* 2 *part* 165. *Bull v. Palmer.*

Scire facias upon a judgment againſt the defendant, and alledged, that he had waſted the goods, and diſpoſed and converted them to his own uſe. Iſſue *Non Devaſtavit, vendidit ſeu in uſum ſuum proprium convertit*; ſpecial verdict found, that one *A.* was liable to an action of trover to the defendant for goods of the inteſtate; and that after action brought the defendant and *A.* came to an agreement by articles, that the defendant ſhould diſcharge *A.* and that *A.* ſhould pay to him a ſum at ſuch a day yet to come; *Et ſi, &c.* and it was argued by *Eyre* for the plaintiff, that the iſſue is found for him; becauſe the defendant, by acceptance of a new ſecurity for payment of the money to himſelf, had extinguiſhed the old right, as if he had accepted an obligation for a debt due by contract and thereby hath made himſelf ſubject, although he hath not yet received the money; for the new ſecurity is as payment to him. *Yelverton* 10. To which it was anſwered by *Pollexfen*, that it could

could not be a *Devaſtavit*, for he hath not done any wrong, but hath taken the beſt means that he might for to ſecure the eſtate; and it is not like the caſe of an obligation taken for a ſum due by ſimple contract; for there is a debt certain, here are only damages to be recovered in the diſcretion of the jury, which are made certain by the articles, but are not Aſſets in his hands till the money received. *Curia*, It is not a *Devaſtavit*: but after, by Sir *Thomas Jones*, it is a diſpoſal or vendition, and converſion to his uſe, by the acceptance of a new ſecurity, by which he hath diſcharged the ancient right to the goods, and ſo it is *quaſi* a ſale of them, and aſſets preſently, although that by his act the money is not payable to him till a day to come; to which ſome of the other juſtices ſeemed to incline; but it was adjourned; and after, at another day the next term, all the juſtices agreed, that it was a diſpoſition by him, and judgment was given for the plaintiff *per tout le court*. *Levinz* 2 *part* 189. *Norden v. Levit*.

Debt againſt the defendant as executrix to her huſband; the defendant imparled, and then pleaded *Actio non*, becauſe that her huſband died inteſtate, and adminiſtration was committed to her, *Abſq; hoc*, that ſhe is executrix, or at any time adminiſtred as executrix. Upon which the plaintiff demurred; and it was ſaid for the plaintiff, that this plea is no other than a miſnomer which goeth only in abatement, and therefore is not pleadable after general imparlance, and it is not like to a plea of *Ne unque executor*, which totally eſtrangeth him from the teſtator; here ſhe admits herſelf chargeable to the action, but

in other manner, *ſcil.* as adminiſtratrix. To which it was anſwered for the defendant, that although that this plea doth not go to the right of action, yet it is to the action of the writ, as *Robinſon's caſe*, 5 *Co.* And it is a bar to the plaintiff, ſo that he ſhall not at any time charge the defendant as executrix, and ſo it is more than in abatement, although that it is no bar to the right, when the plaintiff will charge the defendant, as he ought to have adminiſtred; but *per Cur'* this plea is only in abatement, and therefore not pleadable, as here after general imparlance, for which they gave judgment for the plaintiff. *Similis Caſus & Simile judicium eodem tempore inter Howley & Sibly*, *Levinz* 2 *part* 190. *Granwel v. Sibly.*

Where one of the executors is an infant, and may not prove the *will*, adminiſtration *durante ſua minori ætate* may be granted to the other who alone ſhall bring the action; and it is not inconſiſtent that he ſhall have the adminiſtration in ſuch caſe; for that it is not granted as upon one dying inteſtate, for the *will* is proved, but only enables him to ſue alone, becauſe that the other is not capable to prove the teſtament, and ſo not to join with him, and he may ſue alone; and *Hatton* and *Maskal*'s caſe was cited, which is entered in *B. R Mich.* 15 *Car.* 2. *Rot.* 703. the roll of which was then brought into court, where it apeared to be ſo adjudged; but where both executors are at full age, there, although that the *will* be proved by one alone, the action is to be brought in both their names. *Levinz* 2 *part* 240. *Colborne v. Wright.*

Upon

Upon general pleading *Riens per diſcent*, a reverſion in fee upon an eſtate-tail is not aſſets to charge the heir. *Levinz* 3 *part* 287. *Kellowe v. Rowden.*

Debt for rent and declared on a leaſe made by the plaintiff to *J. S.* who made *J. D.* executor, who aſſigned the term to the defendant; the defendant pleaded, that before any rent arrear, he aſſigned the term to *J. G.* but did not plead notice of it, nor acceptance of the rent from him by the plaintiff; whereupon the plaintiff demurred; and it was adjudged for the plaintiff, by *Pollexfen* chief juſtice, and *Rokeſby* juſtice, *contra Powel* juſtice, who held, that the privity of the contract being altered by the aſſignment of the executor before any rent due, and alſo the privity of eſtate by the aſſignment of the aſſignee of the executor, nothing remained whereupon to maintain the action. *Pollexfen* chief juſtice, and *Rokeſby* held, that till notice of the aſſignment it was not a compleat aſſignment to deſtroy the privity of eſtate, but till notice he remained tenant as to the payment of the rent. As in the caſe of lord and tenant; if the tenant make a feoffment, yet he remains tenant as to the avowry, till notice of the feoffment and tender of arrears. *Levinz* 3 *part* 295. *Tongue v. Pitcher.* 3 *W. & M. in C. B.*

1 Sid. 266, 338. 1 Lev. 127, 308. 2 Lev, 231. 2 Saund. 181, 182, 302, 303. 2 Vent. 209. 3 Mod. 325. 4 Mod. 71 to 76. 1 Show. 340.

Executor of his own wrong may be of a term, and ſhall be charged in waſte. *Levinz* 3 *part* 35. *Major & Com' de Norwich* v. *Johnſon*, *Mich.* 33 *Car.* 2.

Aſſumpſit againſt the defendant executor of *Walwin*; the defendant pleaded an obligation of 40 *l.* entered into by the teſtator, yet unpaid, and

Vide ante p. 156.

and no aſſets beyond 5 *l.* which were not ſufficient to ſatisfy the aforeſaid debt. The plaintiff replied, that the obligation was conditioned to pay 20 *l.* at a day yet to come; and upon demurrer judgment for the defendant: becauſe the plaintiff did not ſay in his replication, that the defendant had aſſets *ultra* to pay the 20 *l.* for if he had not, he was not oblig'd to pay the plaintiff the debt upon contract, before the debt due upon an obligation at a day yet to come. *Levinz 3 part 57. Lemun v. Fooke, Trin. 34 Car. 2 in C. B.*

Aſſumpſit, as aſſignee of commiſſioners of bankrupt, *ſcil. Staly* a goldſmith, where upon *Non aſſumpſit* and a ſpecial verdict, The caſe was, That *Staly* being indebted to *Walter* in 1000 *l.* upon judgment and to divers other perſons, particularly to one *Clark* in 1000 *l.* who died and made one *Crew* his executor: *Crew* ſued a bill of *Middleſex* againſt *Staly*, *Nov.* 6. which was before the probate of the *will*, *that* being not till the 18th of *Nov.* *Staley* was arreſted before the probate, *ſcil.* the 8th of *Nov.* and put in priſon; and the ſame day that the probate was, *ſcil.* the 18th of *Nov.* *Staly* paid the 1000 *l.* to *Walter*; but if the payment was before the probate or after, appeared not, but it was upon the ſame day; and after this, a commiſſion of bankrupt is ſued againſt *Staly*, and the commiſſioners aſſigned this 1000 *l.* paid to *Walter* to the plaintiff, as part of the eſtate of *Staly*. And in this caſe divers points were, in which the court did not unanimouſly agree; but in one they all agreed, *ſcil.* that the arreſt of *Staly* by the executor, before the probate, was not legal as to *Walter*, and then *Staly* could not become bankrupt the 8th of *Nov.* when the arreſt was made,

as

as to *Walter*; ſo that the payment to *Walter* was good. They agreed, that between the parties, that is, between *Crew* and *Staly*, the bill of *Middleſex*, and the arreſt upon it before the probate, were made good by the probate after, according to 1 *Roll. Execut'*, 917. Executor ſued a writ, and arreſts a man before probate, and afterwards proves the *will*, all is made good between them being parties: But in the caſe here it ſhall not prejudice a third perſon *Walter*, to make the payment to him ill, which had been good, if it had not been for this arreſt; which *in rei veritate* cannot be good before probate, although that between the parties it is good by relation. Note, That the words of the ſtatute are, That a man arreſted, and in priſon ſix months, ſhall be a bankrupt from the time of the firſt arreſt; and here *Staly* was arreſted the 8th of *Nov.* and lay in priſon ſix months. *Vide Raymond* 478. Error of this judgment, and the judgment affirmed. 1 *Ventr.* 370. *Levinz* 3 *part* 57. *Duncomb* v. *Walter*.

1 Roll. Execut', 917.

The relation ſhall not prejudice ſtraingers. Trin. 34 Car. 2. 3 Lev. 576. B. Paſch. 36 Car. 2. 1 Vent. 370. B. R.

Trover by an adminiſtrator, and count that he himſelf was poſſeſſed of the goods and loſt them, and the defendant converted them; and upon *Non cul'* verdict for the defendant; and the queſtion was. If the plaintiff ſhould pay coſts: For it was objected by *Seis*, ſerjeant, that the action being of his own poſſeſſion, he need not have named himſelf adminiſtrator; and he cited *Atky* and *Heard*'s caſe, 1 *Cro.* where, in ſuch a caſe, the plaintiff paid coſts: But on the other ſide were cited *Peacock*'s caſe; where, in raviſhment *de gard* by an executor of a raviſh-

4 Mod. 244. 2 Lev. 165. 2 Jon. 47. 1 Vent 92, 94, 166. Cro. El. 228, 503. Cro. Car. 29. Hut. 78. 2 Cro. 229, 361. Yelv. 168. 3 Leon. 152. 6 Mod. 91. 1 Sal. 207. Vide 4. Jac. c. 3. In Peacock's caſe the iſſue was found for defendant. Vide 8 El. c. Mich. 7 Car. in Atky v. Herd. in ſuch a caſe plaintiff paid coſts. Cro. Car. 219. Vide 23 H. 8. c. 15.

ment

ment in his own time, the plaintiff being nonſuit paid no coſts; and *Bull* and *Palmer*'s caſe, *Paſch.* 28 *Car.* 2. *B. R. Aſſumpſit* by an executor upon *inſimul computaſſet* with him for a debt due to the teſtator, the executor nonſuit paid no coſt; and now *per tout le court*, the plaintiff ſhall pay no coſt; for all is in the right of the inteſtate, although that the converſion was done in the time of the adminiſtrator, and the damages and coſts recovered or loſt ſhall be upon the account of the teſtator. *Levinz* 3 *part* 60. *Maſon* v. *Jackſon*, 34 *Car. in C. B.*

5 Co. 82.
Cro. El. 400.
2 Saund 49.
1 Mod. 175.
Vaugh. 94, 95.
Keilw. 74.
1 Sid 21.
3 Mod. 115.
Vide ante p. 147.

Debt for rent upon a leaſe-parol for three years from the 28th of *Sept.* 1685. rendring 90 *l. per ann'* rent, and for 270*l.* Rent due *Mich.* 1688. was the action brought after the term ended againſt the defendant executor of the leſſee, who pleaded an obligation entered into by the teſtator, and that he had not aſſets *ultra* 5 *l.* which are not ſufficient to ſatify the debt upon the obligation; the plaintiff demurred; and the queſtion was, If this rent upon leaſe parol and the term ended be payable before the debt upon obligation; and it was argued for the plaintiff, that the rent being due upon real contract, although it be by parol, is of a more high nature than the obligation: But for the defendant it was ſaid, that the term being ended, the arrears are become meer perſonal; otherwiſe it had been perhaps, if the leaſe had remained *in eſſe*, becauſe then the plaintiff might have diſtrained for it. The authorities cited were *Style* 2. 61. 1 *Rol. Abr.* 927. *ſ.* 2. 3. 11 *H.* 4. 79 *b.* 13 *H.* 4. 9. none of which come directly nor is there any authority to be found in the books direct in this caſe. *Quod Cur' admirabat'*, being a caſe

caſe which often happened. *Pollexfen* juſtice inclin'd for the plaintiff for the defendant could not wage his law, which proved it not to be meerly perſonal. *Powel*, juſtice, inclin'd to the difference, where the leaſe parol is determined or not; & *adjornat'*. But afterwards judgment was given *per tot' Cur'* for the plaintiff. Upon which a writ of error was immediately brought in *B. R.* and *in Trin. 3. W. & M.* the judgment was affirmed *per Holt* chief juſtice and *tout le court*; who held, that the contract remained in the realty, notwithſtanding the term was determined. *Pemberton* for the plaintiff; *Levinz* for the defendant. *Levinz 3 part* 267. *Newport* v. *Godfrey*.

Debt upon an obligation againſt baron and feme, as the feme was heir to *Boſtock*. The defendant pleaded in abatement another action depending againſt the huſband, and others, as executors of *Boſtock*. The plaintiff demurred; and it was argued for the defendant, that the plea was good; for admit that the plaintiff might charge the heir or executor at his election, or both ſeverally, and recover part againſt one, and the reſidue againſt the other, yet he may not charge one and the ſame perſon as heir, and alſo as executor at the ſame time; for by that means he might have two judgments at the ſame time for the ſame thing, for which the defendant could not have any remedy by *Audita querela*; for he might not alledge it for relief in *Audita querela*, becauſe he might have pleaded it in abatement. But where an action is againſt one perſon as heir, and another action againſt another perſon as executor, and he hath two judgments, and after that he hath levied the debt upon one, he endeavoureth to levy it again upon

upon the other; he ſhall be aided by *Audita querela*, becauſe that he could not have pleaded it in abatement; and of ſuch opinion was *Pollexfen*, chief juſtice, upon the firſt argument in that term; but *Powel*, juſtice, *contra*. For being one and the ſame perſon repreſenting as well the heir as the executor, it is all one as if it was in divers perſons. *Rookeſby* then ſilent; but afterwards, in another term, *Pollexfen* being dead, judgment was given by *Powel* and *Rookesby*, juſtices, that the defendant *Reſpondeat ouſter*. *Levinz* 3 *part* 303. *Haight* v. *Lanham. paſ.* 2. *W. & M. in C. B.*

Debt againſt them as executors of *Boſtock* upon the obligation *ſupra*, *Langham* pleaded in abatement another action depending againſt him, and his wife, as ſhe was heir; the plaintiff demurred, and the judges differed in opinion *ut ſupra*. *Adjornat' ulterius arguend'*. *Vide* 36 *E.* 3. 36, 38. Two writs brought for the ſame thing, each pleaded in abatement to the other, and both abated. The like opinion 9 *H.* 6. 51. and 39 *H.* 6. 38. and *Co.* 5. *Sparry*'s caſe. The reaſon of the abatement of the writs was not only becauſe he ſhall not be twice charged, but that he ſhall not be twice vexed for the ſame debt. And that the obligee might charge the heir or executor at his election, or both, if the one hath not ſufficient. *Vide* 1. *And. Pl.* 13. The heir charged, although the executor had aſſets. *Fitz. Execution*, 163. *Dyer* 204. In debt againſt the heir, it is no plea that the executor hath aſſets. 7 *H.* 4. 2. Debt lieth not againſt the heir, until the ſheriff return'd that the executor hath no aſſets; and *Co.* 2 *Inſt.* 233. and 7 *E.* 4. 13. *a.* Opinion that debt

debt lieth not againſt the heir, if the executor hath aſſets. And afterwards judgment was given as in the caſe above, *de Reſpond. ouſter. Levinz 3 part* 304. *Haight* v. *Langham, Hall, &c. Executors de Boſtock. Paſ. 3. W. & M. in C. B.*

Debt upon an obligation; the defendant pleaded a judgment againſt him as executor upon an obligation of the teſtator, but did not conclude *prout patet per recordum*, and pleaded divers other judgments well, and that he had fully adminiſtred *Omnia bona teſtatoris præter* 10 *s.* which are charged with the ſaid judgments, and not ſufficient to anſwer them. The plaintiff replied, *Proteſtando.* that all the judgments were had by fraud, for plea ſaith, that on the day of the writ there was not more than 100 *l.* due upon all the judgmenss, and that the defendant then had aſſets ſufficient to ſatisfy the judgments, and alſo the plaintiff his debt, and that he permitted the judgments to remain in force to defraud him; upon which the defendant demurred generally; and now it was reſolved by the court; Firſt, That this general pleading of aſſets ſufficient to ſatisfy all the judgments and the plaintiff, was good: but then, ſecondly, The material part of the plea is the aſſets, and of that no *Venue* is laid where he hath aſſets, as it ought. And therefore the aſſets is not triable, and that is an incurable fault. But then, Thirdly, It was objected that the plea was ill, not concluding, *prout patet per recordum* of the firſt judgment. To which it was anſwered, that the fault of it is no other than a default of trial by the record, which is paſt over by the replication which hath admitted all the judgments; but that

that the defendant hath aſſets *ultra* to ſatisfy them, which is no more than the omiſſion of a *Venue* for trial by the country, which is always cured by the pleading other matter over to be tried, which is the aſſets here, and of that *Cur' adviſare vult:* but after ruled it accordingly. *Levinz 3 part* 311. *Knighton* v. *Morton Executor*, 3 *W. & M. in B. R.*

Vide 4 & 5 Ann. c. 16.

Debt upon an obligation againſt an executor, the defendant pleaded ſeveral judgments obtained againſt him upon ſeveral obligations made by the teſtator, and that he had not aſſets *ultra*, *&c.* The plaintiff replied as to an obligation of 200 *l.* that it was upon condition to pay 100 *l.* and ſo to all the others ſeverally; and that the defendant had aſſets to pay the plaintiff *& ultra* to ſatisfy the ſaid leſſer ſums, *ſcil.* at ſuch a place. The defendant rejoined, that he had not aſſets *ultra* to ſatisfy the debts and judgment in his plea. Upon which the plaintiff demurred ſpecially becauſe the rejoinder did not directly anſwer the replication, but ambiguouſly: and now it was argued by *Pemberton*, that the defendant ought to have rejoined, only that he had not aſſets *ultra* to ſatisfy the ſaid leſſer ſums, and not to make the penalties in the judgments parcel of the iſſue; for if he had aſſets *ultra* the leſſer ſums, he ought to pay the plaintiff. To which it was anſwered, and reſolved by the whole court, that the rejoinder was good; for the penalties are legal and due debts till they are ſatisfied, under which he might defend himſelf againſt other actions; for although that in equity and conſcience the leſſer ſums were only due, yet perhaps the plaintiffs

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in them will not accept the leſſer ſums in ſatisfaction of the judgments without ſuit in equity; and if they would, or offer to accept the leſſer ſums, and the defendant will not pay them, the plaintiff may help himſelf by another manner of pleading, *ſcil.* That the plaintiff would, and offered to accept the leſſer ſums, and the defendant would not pay them, but kept the judgments on foot by fraud and covin; and ſo upon the iſſue of fraud and covin, the plaintiff might give in evidence of ſuch matter that ſhould ſerve him to avoid the penalties; but he cannot aid himſelf by ſuch general manner of pleading, as it is in this caſe at bar; for which judgment was given for the defendant *per tout le court, ſcil. Treby, Nevil, Powel* and *Rookesby.* But then it was prayed by the plaintiff, that he might replead, which was granted to him by the court, upon condition that the defendant might alſo replead in bar, and plead more judgments if he had any to plead, but not otherwiſe. *Levinz 3 part 368. Thompſon* v. *Hunt Trin. 5 W. & M. in B. R.*

Scire facias againſt the defendant, executor of *J. S.* upon a decree in the exchequer againſt *J. S.* for money. The defendant pleaded, that the teſtator was indebted to him upon obligation, and that he had paid himſelf before the *Scire facias* brought, or notice of the decree. This caſe having been heard before, was ruled by *Lechmore* and *Turton*, barons, againſt Baron *Powel*, that it was not any bar. And now upon rehearing before all the barons, *Atkins*, chief baron, agreed with *Lechmore* and *Turton*, *contra Powel*, that it was not any bar. And that a decree in

Executor obliged by decree in equity to pay money, equally as by a judgment at common law.

equity doth oblige executors, in equal degree at leaſt, with a judgment at common law. *Levinz* 3 *part* 355. *Shafto* v. *Powel in Scaccario.*

3 Mod. 239. Show. 35. 1 Danv. 28. pl. 13. 2 Lev. 245. 2 Jo. 126. 2 Mod. 260. 2 Lev. 174. 1 Vent. 298.

Aſſumpſit lieth for executors for a copyhold fine ſet by the teſtator. *Levinz* 3 *part* 261. *Shettleworth* v. *Garnet.* 1 *W. & M. in C. B.*

In action upon the caſe, for calling a perſon of quality *whore*, by which ſhe loſt her marriage; it was rul'd upon motion, that the defendant ſhould find ſpecial bail, although that generally in actions for words no ſpecial bail ought to be. Yet for the circumſtances of the caſe the court might compel the defendant to find ſpecial bail; and ſo in caſe againſt executors, although that they ſhall not find bail in ordinary caſes, yet in ſpecial caſes they ſhall find bail, as if it appear that they have waſted the goods, *&c.* *Levinz* 1 *part* 39.

Aſſumpſit, That whereas *Saunders* was indebted to divers perſons, and the plaintiff bound for him, and forced to pay them; the defendant, executor of *Saunders*, in conſideration that the plaintiff would forbear to ſue him for the money, promiſed to pay him; after verdict for the plaintiff upon *Non Aſſumpſit*, it was moved in arreſt of judgment, that here is no conſideration, for it doth not appear that *Saunders* had promiſed or was obliged to ſave him harmleſs; and *Borden* and *Thin*'s caſe, *Yelv.* 40. and *Smith* and *John*'s caſe, *Owen* 132. were cited. But *per Cur'*; It was equity, that *Saunders* ſhould ſave the plaintiff harmleſs, and ſuit in equity is a ſuit: or perhaps he might be charged *per plegiis acquietandis*, and therefore they held the conſideration good, and gave judgment for the plaintiff,

tiff, *Niſi cauſa, die Lunæ prox. &c. Levinz* 1 *part* 71. *Scot* v. *Stephenſon.*

Aſſumpſit againſt two executors upon the promiſe of the teſtator, iſſue *Non Aſſumpſit*; one executor died, which is ſuggeſted upon the roll, and the trial brought againſt the other, and verdict for the plaintiff; and in arreſt of judgment it was moved by *Jones*, that the bill was abated by the death of one in caſes of contract, otherwiſe in caſes of treſpaſs. 50 *E.* 3. 7. 40 *E.* 3. 26. *b. Fitzher. Brief* 263, 344. *& Plowd. Com.* 186. *b.* In caſe of executors ſued upon contract, the death of one doth abate the writ. † But of that, in caſe of executors, the court at firſt doubted; but at another day, having ſeen the caſe in *Plowd. Com.* 186. *Woodward* v *Davies*, which is direct in the point, they reſolved the writ ſhould abate, and the judgment ſtay'd. *Levinz* 1 *part* 165. *Wirald* v. *Brand.*

† But by the Stat. 8, 9. W. 3. ch. 11. it ſhall not abate. See the ſtatute.

Debt for rent by the heir upon a leaſe by the anceſtor rendering rent to him, his executors and aſſigns, during the term; and upon demurrer the queſtion was, if the heir might maintain action of debt upon this leaſe. And it was argued for the defendant, that the action lieth not by the heir, he not being mentioned in the reſervation, but by the death of the leſſor the rent determined; for which they cited *Owen* 9. *Richmond* v. *Butler*, *Latch* 44, 255, 264. *Sury* v. *Cole.* But *e contra* were cited for the plaintiff, *Paſch.* 22 *Jac. Rot.* 62. *Sury* v. *Cole* and *Hill.* 20 *Jac. Rot.* 177 *Sury* v. *Browne.* Both adjudged, that the rent continued, againſt that which is reported in *Rolls* and *Latch*, in theſe very caſes. *Hale* chief juſtice; the rent being reſerved to him, his exe-

cutors and aſſigns, ſhall continue after the death of the leſſor, and ſhall go to the heir by the apparent intent that it ſhould endure after the death of the leſſor; for otherwiſe it could not go to the executor, and that without the words during the term; otherwiſe where the rent is reſerved to him, or to him and his aſſigns. And at another day afterwards, after that the caſe had been twice argued by *Jones* and *Hunt* for the plaintiff, and by *Bigland* and *Winnington* for the defendant, judgment was given for the plaintiff. *Levinz* 2 *part* 13. *Sacheveral* v. *Frogat.* 2 *Saund.* 367.

Aſſumpſit for 100 *l.* for wares ſold by the plaintiff, and one *Witty*, whom the plaintiff ſurvived. The defendant pleaded in abatement, that the plaintiff and *Witty* were joint-merchants, and that by the law-merchant there is not any ſurvivor between them, and that *Witty* made ſuch a one his executor, who hath adminiſtred, and is now living, not party to the ſuit as he ought. Upon which the plaintiff demurred, and upon conſideration of *Co. Lit.* 172, 182. & *F.N.B.* 172 *E.* it was reſolved by the whole court, that the bill ſhould abate. *Levinz* 2 *part* 188. *Hall* v. *Huffam.*

Debt in *London* againſt the defendant as heir, and it being removed in *B. R.* the queſtion was, if he ſhould find bail here, as he had done in the inferior court of *London*, where they always compel heirs and executors to find bail. Yet of executors there are precedents where executors ſued there, and having found bail there, were compelled to find bail here upon removal of the court: but no precedent being ſhewn for finding

of bail by the heir in ſuch caſe; *Per Cur'* ſpecial bail was denied to be found in this caſe; and it was ſaid, that *Keeling* and *Hale* had denied it in caſes of executors, upon removal of the cauſe here. *Levinz* 2 *part* 204. *Sir John Lawrence* verſus *Blithe*.

Aſſumpſit by *Hall* and *Wood*, and his wife executrix of *Whitley*, and count, that by the law-merchant there is not any ſurvivor, and that *Hall* and *Wood*, joint-merchants, were poſſeſſed of 40 ounces of musk, and ſold it to the defendant paying ſo much *per* ounce as they ſhould ſell their other musk, and that they ſold the other at ſuch a price, and that the defendant had not paid, and declared alſo of another promiſe made to the plaintiff after the death of the teſtator. After verdict for the plaintiff, upon *Non Aſſumpſit*, it was moved in arreſt of judgment, that the plaintiffs ought not to join but ſever for their moieties, becauſe for the executor the action ought to be in the *Detinet* only, and for the ſurvivor in the *Debet* and *Detinet*. 2. The executor himſelf ought not to join two promiſes in one action, of which one was made to the teſtator, and the other to himſelf; but *Non allocatur*. The judgment is all one for the plaintiff, executor and another, and ſhall be aſſets ſtill in the hands of the executor. But a man may not ſue an executor and another jointly; for the one is to be charged *De bonis Teſtator'*, the other *De bonis propriis*. And judgment was given for the plaintiff. *Levinz* 2 *part* 228. *Hall, &c.* v. *Huffam*.

Aſſumpſit where differences had been between the plaintiff and defendant, (but did not ſay touching what thing the differences were;) they ſubmitted to the award of *J. S.* who awarded *de & ſuper Premiſſis*, that the defendant paid to the plaintiff 30*l.* in ſatisfaction of all ſums due to him out of the eſtate of one *Woolly*. After verdict for the plaintiff judgment was ſtay'd, and after divers motions in that and other terms, entred for the defendant; becauſe it appeared not that the defendant is executor, adminiſtrator, or truſtee for *Woolly*, nor that he had any thing of it, or had ſubmitted upon the behalf of himſelf; and ſo no conſideration to charge him for the eſtate of *Woolly*. *Levinz* 2 *part* 235. *Adams* verſus *Statham*.

And thus having directed teſtators in the due and legal forming of their *wills* and teſtaments, and executors in the true and regular performing of them; that we may be provided for all events, we are to conſider how men's eſtates are to be adminiſtred or diſpoſed of, when there is no will or teſtament made or declared by them. And this occaſionally induceth us to treat concerning

Adminiſtrators.

Adminiſtrator, what.

ADminiſtrator is he to whom the ordinary commits the adminiſtration of the goods of a dead man, for default of an executor; and an action ſhall lie againſt him, and for him, as for an executor. And he ſhall be charged to the

the value of the goods of the dead man, and no further, unleſs it be by his own falſe plea, or by waſting the goods of the dead.

If the adminiſtrator die, his executors are not adminiſtrators, but it behoves the ordinary to commit a new adminiſtration. And if a ſtranger, that is not adminiſtrator or executor, take the goods of the dead, and adminiſter of his own wrong, he ſhall be charged, and ſued as an executor in any action brought againſt him. *Termes del Ley. verb. Adminiſtrator.*

The ordinary ſhall have an action for goods taken out of his own poſſeſſion which were the inteſtate's, but not thoſe taken out of the poſſeſſion of the inteſtate in his life-time; but the adminiſtrator ſhall have ſuch action for goods taken out of the poſſeſſion of the inteſtate. *F.N.B.* 203. The proceſs herein is attachment or *Diſtringas*, and if the ſheriff thereupon return *Nihil*, then he ſhall have *Capias*, *Alias & Pluries & Exigent*, and ſo proceed to outlawry againſt him. *Ibid.* F.N.B.203.Eng.

Where adminiſtration is granted by the inferior dioceſan, where there is *Bona notabilia*, and after it is granted by the archbiſhop, or *e contra*, how they ſhall operate together. *Coke's* 8 *Rep.* 135. *Sir John Nedham's caſe.*

Adminiſtrator *durante minore Ætate*, if he waſte goods ſhall be puniſhed as executor of his own wrong.

If adminiſtrator avers in his declaration adminiſtration granted to him at *London*, and the letters of adminiſtration bear date in another place and county, the plaint ſhall abate. *Touchſtone of Precedents* 195.

Vide poſt p. 123.

An executor hath judgment to recover a debt due to the teſtator, and dieth inteſtate before execution, and the ordinary committeth the adminiſtration of the firſt teſtator to one, the adminiſtrator ſhall not ſue execution upon that recovery; becauſe he deriveth his intereſt, and repreſents the perſon of the teſtator, and ſo before the recovery. *Co.* 1 *Rep.* 96. *Shelly's caſe. Vide* 17 *Car. cap.* 8.

Vide poſt p. 123. & 124.

Letters of adminiſtration obtained by colluſion are void, and ſhall not repeal a former adminiſtration. *Co.* 3 *Rep.* 78.

If an adminiſtrator hath judgment and dieth, his executors cannot ſue execution of that judgment; for none ſhall have execution of that judgment, but he who ſhall be ſubject to the payment of the debts of the firſt inteſtate, and that the ſaid executors are not. And the adminiſtrator of an executor ſhall not have execution of a judgment given for the executors. *Co.* 5 *Rep.* 9. *Brudnell's caſe.*

By 17 Car. 2. c. 8. Where any judgment after a verdict ſhall be had, by or in the name of any executor or adminiſtrator; in ſuch caſe, an adminiſtrator de bonis non may ſue forth a Scire facias, and take execution upon ſuch judgment.

If a man leaſe a houſe and land for years, with a ſtock of money, rendring rent, and the leſſee covenanteth for himſelf, his executors, adminiſtrators and aſſigns, to deliver the ſtock or ſum of money at the end of the term; yet the aſſignee ſhall not be charged with this covenant: for although the rent reſerved was increaſed in reſpect of the ſtock or ſum, yet the rent did not iſſue out of the ſtock or ſum, but out of the land only; and therefore as to the ſtock or ſum the covenant is perſonal, and ſhall bind the covenanter, his executors and adminiſtrators, but not his aſſigns. *Co.* 5 *Rep.* 17. *Spencer's caſe.*

And

And if a man releaſe, and after take adminiſtration, it ſhall not bar him, for the right of the action was not in him at the time of the releaſe; but if an executor releaſe before probate, it ſhall bar him. *Co.* 5 *Rep.* 28. *Middleton's caſe.*

An adminiſtrator ſhall pay a debt due by bond before a ſtatute defeaſanced to perform covenants, which perhaps never were nor ever will be broken. *Co.* 5 *Rep.* 28. *Harriſon's caſe. Vide ante p.* 142.

Adminiſtration *durante minore ætate* ſhall ceaſe at 17 years of age, and if ſuch adminiſtration be committed, the executor being 17 years of age, it is void. *Co.* 5 *Rep.* 29. *Piggot's caſe.*

Adminiſtrator *durante minore ætate* cannot ſell any goods of the deceaſed, if it be not for neceſſity for payment of his debts, or *Bona peritura*; for he hath his office of adminiſtration *pro bono & commodo* of the infant, and ſuch adminiſtration doth ceaſe at the age of 17 years of the infant. And an infant executor cannot aſſent to a legacy, *&c.* before the age of 17 years; and if the infant within age of 17 years take huſband, if the huſband be of full age the adminiſtration ſhall ceaſe. Vide ante p. 216.

If the metropolitan pretending the party deceaſed had *Bona Notabilia* in divers dioceſſes commit adminiſtration, it is not void, but voidable by ſentence. But if an ordinary of a dioceſs commit adminiſtration of goods, when the party hath *Bona Notabilia* in divers dioceſſes, ſuch adminiſtration is meerly void, as well to the goods in his own dioceſs as all others. *Co.* 5 *Rep.* 29, 30. *Prince's caſe. Vide ſupra, p.* 27. *and ante Wentw. p.* 46.

By

By the cuſtom of *London*, an executor or adminiſtrator is bound to pay money due upon a contract of the inteſtate, as well as if it were by obligation. *Co.* 5. *Rep.* 83. *Snelling's caſe.*

Executors and adminiſtrators ſhall have actions of debt for all rents arrear in life-time of the teſtator, and may alſo diſtrain for the ſame. *See* 32 *H.* 8. *Wing. Abridgment*, *Rents* 1, 2, 3.

When adminiſtration is committed generally, *Ratione Minoris Ætatis*, without any reſtraint or limitation, there ſuch leaſes made by him are good. And ſuch adminiſtrator ſhall have action to recover debts and duties, *&c.* for the intereſt of actions is in him, and ſhall likewiſe be liable to actions. *Co.* 6 *Rep.* 67. *Sir Moyle Finch's caſe*,

Probate of *wills*, and conſtituting adminiſtrators, originally did not belong to the eccleſiaſtical conuſance, but were given to them of latter times and therefore nothing but the probate, and granting adminiſtration, is given to them, or doth appertain to their juriſdiction; but the trial of them is not given to them, for that is left to the trial of the common law. And 21 *E.* 4. 50. it is holden, that if letters of adminiſtration be denied, the iſſue ſhall be, that the ordinary did not commit adminiſtration by his letter, *&c.* For there it is ſaid, that letters of adminiſtration may be forged. And foraſmuch as it is to be tried by jury, and not by the certificate of the ordinary: nor it needeth not that the *will* or adminiſtration be ſhewed, to enable the plaintiff to his action, proved or granted by the ordinary himſelf, as in caſe of ex-

excommengement, which is meerly ſpiritual, and originally belonging to the juriſdiction of the ordinary. But if the teſtament be proved, or adminiſtration granted by the official or commiſſary, or in ſome caſes by the archdeacon, or other inferior judges eccleſiaſtical, who have lawful authority, in ſuch caſe it is ſufficient in law. *Coke's* 9 *Rep.* 41. *Henſloe's caſe.*

Where executors of executors, adminſtrators, and the heir after the age of 14, ſhall have accompt. *See Co.* 2 *Inſt.* 404.

If the adminiſtrator give or ſell the goods of the inteſtate, and after the adminiſtration is countermanded, and granted to another, yet the gift or ſale is good, unleſs it be avoided for covin, by *Stat.* 13 *Eliz.* And if the adminiſtrator doth waſte the goods, and afterwards adminiſtration is granted to another, yet any creditor ſhall charge him in debt. And if he plead the adminiſtration committed to another, the other may reply, that before the ſecond adminiſtration committed he had waſted the goods, *&c.* *Co.* 6 *Rep.* 18, 19. *Packman's caſe.*

There is a great difference between an adminiſtration that was once lawful, and an adminiſtration that was never lawful. *Vide ibid.*

There is a difference between a ſentence declaratory, by which letters of adminiſtration are declared to be void; and a ſentence of repeal, which allows them to be good till repealed. *Co.* 8 *Rep.* 143. *Dr. Drurie's caſe.*

Eccle-

Eccleſiaſtical courts, or other perſon, to take but 1 *s.* for the ſeal, writing or ſuing forth adminiſtration, to any ſeaman dying in pay of the navy, unleſs he hath goods of the value of 20 *l.* upon pain to forfeit 10 *l. Stat.* 9 & 10 *W.* 3. *cap.* 41. *Waſh. Abridg. Stores* 7.

A Term granted to the uſe of a feme ſole, ſhe dies, her adminiſtrator and not her huſband ſhall have it. *Co.* 4 *Inſt.* 87.

There be divers kinds of inteſtates; one that makes no *will* at all, another that maketh a *will* and executors, and they refuſe; in this caſe he dieth *quaſi Inteſtatus*; and juſtly did the law in this caſe appoint the ordinary; for the law preſumed, that he who had the care of his ſoul in his life-time, would, after his death, have care of his temporal goods to ſee them well diſpoſed of. *Co.* 2 *Inſt.* 397.

Ordinarius in law, in the common ſenſe, ſignifieth a biſhop, or he or they that have ordinary jurisdiction; and is derived *ab Ordine*, to put him in mind of his duty and place.

If the ordinary take goods of the inteſtate and die, yet his executors and adminiſtrators ſhall be charged in an action of debt. *Vide Co.* 2 *Inſt.* 397, 398.

The probate of every biſhop's teſtament, or granting adminiſtration of his goods, doth belong to the archbiſhop, although he hath no goods but within his own dioceſs. What fees for probate of teſtaments and adminiſtrations, *vide Co.* 4 *Inſt.* 335.

Ordinary inferior grant of adminiſtration is void whilſt the prerogative adminiſtration granted by the archbiſhop is in force, for the two adminiſtrations

miniſtrations cannot ſtand together. *Co.* 8 *Rep.* 135. *Sir John Nedham's caſe.*

The ordinary hath not power to give authority to another to ſell the deceaſed's goods, becauſe he himſelf hath but an authority; and *Bona deveniunt ad manus Ordinarii diſponenda*, that is, for the good of the deceaſed. *Ibid.* 135. *b.*

There are three kinds of executors: the firſt appointed by law, and therefore called lawful, as the biſhop or ordinary. The ſecond appointed by the teſtator, and therefore called teſtamentary; and the third appointed by the biſhop or ordinary, and is called dative as an adminiſtrator.

The ordinary ſhall not have action of treſpaſs for carrying away goods before he hath actual poſſeſſion of them, (as executors or adminiſtrators may have,) but before poſſeſſion the ordinary may ſue for them in the ſpiritual court; and the ordinary ſhall not have action of debt as ordinary. *Vide plus Co.* 8 *Rep. Sir John Nedham's caſe.*

Where a man as general receiver retained one in the ſervice of his maſter, taking for his ſalary 10 *l. per Annum* by deed: in this caſe, although the maſter might wage his *Ley*, yet the receiver who was made aminiſtrator was charged in debt for the ſalary, for that he was privy to the retainder by his teſtimony by his bill. But otherwiſe it is where the thing remains always in the nature of an accompt, for which action lieth not againſt an adminiſtrator. 46 *E.* 3. 10. *a. b.*

An

An adminiſtrator *De Bonis non* may ſue out a *Scire facias*, and take execution upon a judgment had in the name of an executor or adminiſtrator. *Stat.* 29 *Car.* 2. & 22 & 23 *Car.* 2. *c.* 10. *Vide* 17 *Car.* 2. *cap.* 8. *made perpetual by* 1 *Jac.* 2. *cap.* 17.

The cuſtom of *London*, that a contract ſhall bind the adminiſtrator as well as an obligation, is good, although contrary to common law. *Co.* 5 *Rep.* 83. *Snelling's caſe.*

Where divers are made adminiſtrators, they have but one joint-intereſt, and therefore one of them cannot diſcharge a debt by himſelf in prejudice of the others, as one executor may do, as is ſhewed in the ninth chapter of *Hern*; but in ſuch caſe all the adminiſtrators muſt join. *Hern's Law Conveyances*, *p.* 88.

If adminiſtration be unduly granted by the ordinary of an inferior dioceſs, the party grieved cannot have a prohibition at the common law, but he muſt appeal to the metropolitan or archbiſhop of the province, from thence to the court of delegates; for the Stat. of 21 *Hen.* 8. doth not ſay, That the adminiſtration ſhall be committed to the next of blood, or elſe the adminiſtration to be void; but that it ſhall be granted on ſuch a pain, and ſo it does not take away the cognizance of the caſe from the eccleſiaſtical judge. *Meriton's Touchſtone of* wills *and teſtaments*, *p.* 227. *ſect.* 361.

If one die inteſtate, and the ordinary grants adminiſtration to a ſtranger, and the next of kin ſues a citation out of the ſpiritual court to have the adminiſtration revoked, and pending the ſuit the adminiſtrator ſells the goods to deſeat the next

next of kin, and then the letters of adminiſtration granted to the ſtranger are revoked, and made null by ſentence; yet in this caſe the ſale by the firſt adminiſtrator is good. But if the next of kin had appealed to have the adminiſtration revoked, and pending the appeal the firſt adminiſtrator ſells his goods; then, in ſuch caſe, the ſale is void. And ſo note the difference between a ſuit by citation to revoke a former adminiſtration, and an appeal; for an appeal doth ſuſpend the former ſentence. 37 *Eliz. B. R. Packman's caſe, Co.* 6 *Li. fo.* 18. *b.*

If the ordinary, knowing that there is a teſtament, and an executor named therein, will notwithſtanding grant adminiſtration of the deceaſed's goods, not having firſt called the executor before him to prove the *will*, or to refuſe or accept the executorſhip; then, in ſuch caſe, when the executor ſhall prove the *will*, he may ſue the adminiſtrator in an action of treſpaſs, notwithſtanding the adminiſtration granted by the ordinary. *Swinb. part* 6. *ſect.* 2.

If an executor in an action brought by him recovereth, and afterwards dieth inteſtate, and then adminiſtration of the goods of the firſt teſtator is committed to *J. S.* in this caſe *J. S.* before the Stat. 17 *Car.* 2. *c.* 8. could not ſue out execution upon ſuch recovery, but was to begin anew; becauſe he comes in paramount to the executor, aud claims immediately from the firſt teſtator. But ſee now the late act made at *Oxford*, 17 *Car.* 2. *c.* 8. for avoiding of unneceſſary ſuits and delays, which is made perpetual by 1 *Jac.* 2. *ch.* 17. *and See Co.* 5 *Rep.* 9. *Brudenel's caſe.*

17 Car. 2. cap. 8. Vide hic ante p. 118.

An

An adminiſtrator is not liable in an action of debt upon a contract of the inteſtate. *Mich.* 30, 31. *El. B. R. Hughſon's and Webb's caſe, Cro. Eliz.* 121.

But if the adminiſtrator after the inteſtate's death promiſe to pay ſuch a debt, if there be a conſideration to ground the action, it is binding. As thus: The huſband was indebted to another man upon a contract for beer, and died inteſtate; the wife took adminiſtration, and afterwards aſſumed upon herſelf to the creditor, that if he would deliver her ſix barrels of beer, ſhe would not only pay for them but her huſband's debt alſo. In this caſe it was adjudged, that judgment ſhould be entered *de bonis propriis* generally, for it became a charge by her own act; and by her promiſe as adminiſtratrix ſhe hath made it her own debt. *Trin.* 37 *Eliz. B. R. in Wheeler's and Collier's caſe, Cro. Eliz.* 406.

An adminiſtrator may bring an action of treſpaſs or trover, and converſion for goods taken away before he obtained the adminiſtration; for the letters of adminiſtration ſhall relate to the time of the inteſtate's death, and not to the time of granting them. *M.* 1652. *B. R. Longe and Hebb's caſe. Vide ante p.* 48. *Wentw.*

Note, That the ordinary may call the adminiſtrator to account, but he cannot force him to make diſpoſition of the ſurpluſage of the inteſtate's goods after debts paid, by the true meaning of the 21 *H.* 8. *c.* 5. But what remains ſhall go to the adminiſtrator; and in caſe there be any more debts to pay, which as yet are not diſcovered, the adminiſtrator ſhall be compelled to anſwer of his own goods; and if the ordinary will

will meddle to cauſe a diſpoſition to be made, a prohibition will be granted againſt him, if the adminiſtrator requeſt it. *M. 6 Car.* 1. *B. R. Levan's caſe, Cro. Jac.* 301.

An adminiſtrator accompted before the ordinary, and proved payment by one witneſs; and becauſe the ordinary would not allow of proof by one witneſs, but did excommunicate the party for want of proof, a prohibition was thereupon granted; and the book ſays there, that the juriſdiction of the ſpiritual court is not taken away by the prohibition, but their proceedings only. *P.* 2 *Car. B. R. Bellamy and Alden's caſe, Latche's Rep. fol.* 117.

Note, That a man may die partly teſtate, and partly inteſtate, by the laws of this realm, though it is contrary to the civil law; and this he may do not only in reſpect of time, but alſo in reſpect of goods and place: for if a man have goods in divers dioceſſes, he may make executors of his goods in one dioceſs, and die inteſtate, as touching his goods in another dioceſs; or if a man make one executor particularly of a certain portion of his goods, the executor is only ſo far chargeable with the payment of the debts and legacies of the teſtator, as the portion of the goods to him allotted do extend unto; and as touching the reſidue of the teſtator's goods, if there be not another executor appointed, then for ſuch goods he is ſaid to die inteſtate, and adminiſtration may be taken of them. *Bro. Execut. pl.* 2. *Fitz. Abr. pl.* 26. *tit. executors. Plo. Co. Greyſbrook and Fox's caſe, Swinb. part* 4. *ſect.* 18. *num.* 4.

Where an appeal is made, and the firſt adminiſtration is confirmed, then the uſe is to ſend back the cauſe to the court from whence it came by appeal; but when the firſt ſentence is reverſed, then the firſt court is ouſted of its juriſdiction, and the court which reverſes it ſhall commit the adminiſtration *de novo*. *P.* 1 *Car.* 1. *B. R. Reeve and Denny's caſe, Latch.* 85.

Appeals in caſes teſtamentary, matrimony and tithes, muſt be ſued from the archdeacon or official (if the matter be there commenced) to the biſhop of the dioceſs, and from the biſhop dioceſan or his commiſſary, in ſuch caſe (when the matter is there commenced) within fifteen days after ſentence given to the archbiſhop of the province, and no farther, but there to be definitively adjudged. *See Num.* 368 24 *H.* 8. *c.* 12. *Wing. Abr. Stat. Tit. Appeals to Rome, num.* 5. *Co.* 4. *Inſt. fol.* 339. *Vide* 24 *H.* 8. *cap.* 12.

When the cauſe is commenced before the archdeacon or commiſſary of the archbiſhop, the appeal may be made (within fifteen days after ſentence given) to the Court of Audience of the ſaid archbiſhop, and from thence within fifteen days after ſentence there, to the archbiſhop himſelf, and no further. When the cauſe is commenced before the archbiſhop himſelf, it was to be determined there without farther appeal, by the *Stat* 24. *H.* 8. *c.* 12. *Wing. Abr. Stat. Tit. Appeals to Rome, num.* 6.

But ſee the *Stat.* 25 *H.* 8. where it is added further, That appeals ſhall be from the archbiſhop's courts to the king in his chancery, where a commiſſion ſhall be awarded under the Great Seal to certain perſons to be named by the King,

King, for the determination of the appeals, and from thence no further; and theſe commiſſioners are called delegates, becauſe they are delegated by the King's commiſſion. *Co. 4 Inſt. fo.* 339, 340. 25 *H.* 8. *c.* 19.

When the cauſe or ſuit concerns the king, the party grieved may, within fifteen days after ſentence given, appeal from any of the ſaid courts eccleſiaſtical to the higher convocation-houſe of that province, and no further; and there to be finally determined. 24 *H.* 8. *c.* 12. *Co. 4 Inſt. fo.* 323, *&c.*

Appeals from places exempt, which were before to the See of *Rome*, ſhall be in the chancery *ut ſupra*, and not to the archbiſhop; and ſhall be determined by the delegates. 25 *H.* 8. *c* 19. *Co. 4 Inſt. fo.* 340.

But note, That there it is ſaid in the caſe aforeſaid, upon the Stat. 24 *&* 25 *H.* 8. that the ſentence ſhould be definitive upon certain appeals there mentioned; yet notwithſtanding, the King, as ſupreme head, upon complaint to him made, may grant a commiſſion of review, for ſo the pope uſed to do as ſupreme head; and the ſame power which the pope had formerly, doth now of right belong to the crown, and is annexed thereunto, by the 26 *H.* 8. *c.* 1. and 1 *Eliz. c.* 1. And ſo it was reſolved, *Tr.* 39 *Eliz. B. R.* where the caſe was, that ſentence being in an eccleſiaſtical cauſe in the country, the party grieved appealed to the archbiſhop, where the firſt ſentence was affirmed; from thence he appealed to the delegates, before whom both the former ſentences were repealed, and made void by definitive ſentence; and thereupon

the queen, as ſupreme head, granted a commiſſion of review *ad rividendum*, the ſentence of the delegates. *Co.* 4 *Inſt.* 341.

If the teſtator make *A. B.* executor after the expiration of five years after his death, or he doth make *A. B.* executor for and during five years after his death; this aſſignation is lawful, and the ordinary may commit the adminiſtration of the deceaſed's goods in the mean time to the next of kin; during which time the act of the adminiſtrator is good, and cannot be avoided by the executor afterwards; and the ordinary may alſo commit the adminiſtration of the deceaſed's goods unadminiſtred by the executor after the expiration of the time of the executorſhip, where *A. B.* is appointed executor but for a time. *Swinb. part* 4. *ſect* 17. *Vide ante Wentw. p.* 10.

One of the half-blood is in as equal degree of kindred to have the letters of adminiſtration committed to him, as one of the whole-blood is. *Style's Rep. fo.* 74, 75. *Hill and Bride's caſe, fo.* 102.

If the ordinary take any reward or fee for preferring of any one perſon before another to the adminiſtration, it is bribery, and puniſhable with a fine and impriſonment at the King's pleaſure, and frequently loſs of his place, *Co.* 3 *Inſt.* 148.

A truſt for raiſing money for a feme ſole, if ſhe marry with the conſent of the truſtees; and if not, then to ſuch perſons as the truſtees ſhall name; and for want of ſuch nomination, then to themſelves; decreed in chancery, to enure to the adminiſtrator of the feme ſole. *Caſes in chancery* 58. *Fleming* againſt *Walgrave.*

Whom the ordinary ſhall appoint adminiſtrators, who ſhall have the benefit and be accomptable as executors, and take bond for performance, and order diſtribution, *vide le Stat.* 22 & 23 *Car.* 2. *cap.* 10.

That act ſhall not extend to the eſtates of feme coverts that die inteſtate, but that their huſbands may have adminiſtration of their perſonal eſtates. *Vide le Stat.* 29 Car. 2. cap. 3. ſect. 25.

No adminiſtrator ſhall be cited to render an accompt of the perſonal eſtate of the inteſtate, otherwiſe than by an inventory thereof, unleſs at the inſtance of ſome perſon in behalf of a minor, or having a demand out of ſuch eſtate, as a creditor or next of kin. *Vide Stat.* 1 *Jac.* 2. 17. *ſect.* 6.

If after the death of the father any of his children die inteſtate without wife or children, in the life-time of the mother, every brother and ſiſter, and their repreſentatives, ſhall have equal ſhare with her. *Ibid. ſect.* 7.

No popiſh recuſant convict ſhall be executor, adminiſtrator or guardian, but the next of kin ſhall have it. *Stat.* 3. *Jac.* 1, 5. *Wing. Abridg. Tit. Crown* 41.

If a man die inteſtate, and a ſtranger taketh the goods, the ordinary ſhall not have an action of treſpaſs for taking them, unleſs he had taken them into his poſſeſſion. But the executor or adminiſtrator, before ſeiſure, may have an action of treſpaſs.

The ordinary cannot have an action of debt, covenant, or any other action which belongeth to the inteſtate, but thoſe to whom the ordinary commits adminiſtration may have all theſe actions, by *Stat.* 31 *E.* 3. 11. 2 *Inſt.* 398.

2 Inſt. 398. If the ordinary take goods of the inteſtate out of his dioceſs, he ſhall not be charged as ordinary by the act *Weſtm.* 2. *cap:* 19. becauſe he taketh them in his own wrong.

The ordinary hath like intereſt in goods and chattels of the inteſtate, as the adminiſtrator to whom adminiſtration is committed *durante minore ætate executoris, ad opus, commodum & utilitatem ipſius executoris, & non aliter ſeu alio modo.*

2 Inſt. 398. 22 & 23 Car. 2. cap. 10. By *Stat.* 22 & 23 *Car.* 2. all ordinaries, as well judges of the prerogative courts of *Canterbury* and *York*, as other ordinaries and eccleſiaſtical judges, having power to commit adminiſtration of goods of perſons dying inteſtate, ſhall take ſufficient bonds of the perſon or perſons to whom adminiſtration is committed, with two or more able ſureties, reſpect being had to the value of the eſtate, in the name of the ordinary, with condition, according to the form in the ſtatute. And the ordinaries may call ſuch adminiſtrator to accompt, and make juſt and equal diſtribution of what remaineth clear (after debts paid, funerals, and juſt expences of every ſort firſt allowed and deducted) among the wife and children, and children's children, if any be, or otherwiſe to the next of kindred in equal degree, or legally repreſenting their ſtocks, *pro ſuo cuique Jure*, according to the laws in ſuch caſes, and rules and limitations in the act ſet down; and to compel the adminiſtrators to obſerve and pay the ſame by due courſe of the eccleſiaſtical laws, ſaving to every one their right of appeal.

Pro-

Provided, This act ſhall not prejudice the cuſtoms in *London*, or province of *York*, or other places having particular received cuſtoms.

The ſurpluſage of ſuch eſtates to be diſtributed as followeth, *viz.* one third part to the wife of the inteſtate, and all the reſidue by equal portions amongſt his children, or ſuch perſons as legally repreſent ſuch children (if any be then dead) other than ſuch child or children (not being heir at law) who ſhall have any eſtate by ſettlement of the inteſtate, or be advanced by the inteſtate by portion or portions equal to the ſhare ſhall be allotted to the others by ſueh diſtribution, in which caſe the portion is to be made equal to the reſt. But the heir at law ſhall have equal part, notwithſtanding any land he ſhall have by deſcent, or otherwiſe.

If there be no children, nor legal repreſentatives, then one moiety of the eſtate to the wife, the reſidue equally to every of the next of kindred in equal degree, and thoſe who legally repreſent them.

No repreſentatives to be admitted among collaterals, after brothers and ſiſters children; if there be no wife, then all amongſt the children; and if no child, then to the next of kindred in equal degree, and ſuch who legally repreſent them.

No diſtribution to be till a year after the death of the inteſtate, and ſuch to whom any ſhare ſhall be allotted ſhall give bond, with ſufficient ſureties in the ſaid courts, that if any debts be afterwards diſcovered or made, then

to refund proportionably towards payment of them.

In all caſes where the ordinary hath uſed to grant adminiſtration *cum teſtamento annexo*, he may do ſo ſtill, and the teſtator's *will* therein to be performed notwithſtanding the act.

This act was afterwards continued. *Vide le Stat.* 22 & 23 *Car.* 2. *The ſaid act was made perpetual, by* 1 *Jac.* 2. *cap.* 17. *ſect.* 5.

By 14 Geo. 2 c. 20. ſect. 9. Diſtribution ſhall be made of eſtates pur autre vie, whereof there is no ſpecial occupant, and which are undeviſed.

The huſband died inteſtate, his wife had the adminiſtration committed to her alone, and after took another huſband, and they recovered in debt as adminiſtrators, during which ſuit the ſon of the inteſtate, by covin between the debtor and him, obtained other letters of adminiſtration to the wife and himſelf jointly. No cauſe of revocation or adnullation of the former letters in certain are ſet forth in the ſecond letters, and after judgment, the ſon by covin, to defeat the execution, releaſed to the debtor all demands and executions, and afterwards the huſband and wife ſue execution, and the debtor upon this releaſe ſued an *Audita Querela*, and had thereupon a *Venire facias* againſt the baron and feme, directed to the ſheriff of *London*, with a *Superſedeas* in it to ſtay execution; and the ſheriff returned *Nihil habent*, and thereupon they appeared and pleaded the matter of covin aforeſaid, and a revocation of the ſecond letters of adminiſtration, by ſentence exemplified under the ſeal of the ordinary pendant the *Audita Querela*, *&c.* and thereupon the parties demur; and all the court were againſt the plaintiffs, and ſo adjudged, *Mich. procheine ſans aſcun argument. Dyer* 339. *Pl.* 46.

One

One *Daniel*, late citizen and goldſmith of *London*, among divers goods and chattels which he had as well in *Ireland* as in *England*, had an obligation of 80 *l.* made in *Ireland* by one *Lucre* a merchant of *Waterford* in *Ireland*. *Daniel* died inteſtate in *England*, and his ſon obtained letters of adminiſtration from the archbiſhop of *Dublin*, of all the goods and chattels of his father within that province, and afterwards he made a releaſe of the ſaid debt and action thereupon to the ſaid *Lucre*. And afterwards the widow of *Daniel* obtained from the archbiſhop of *Canterbury* other letters of adminiſtration of all the goods, chattels and credits within his province, and happened to get the obligation; and upon that, as adminiſtratrix, ſhe ſued *Lucre* in *London*, ſuppoſing the obligation to be made there; *viz. in Paroch' Beatæ Mariæ de Arcubus, in Warda de Cheape*; and this releaſe was pleaded in bar, and the truth was, *ut dicitur*, that the obligation was made in *London*, and remained there ever after. And alſo the obligee died at *Dunſtable* in *Com' Bedford*, and thereupon, notwithſtanding the ſaid adminiſtration and releaſe in *Ireland*, the ſaid *Lucre* the defendant ought to anſwer to the ſaid action as above brought in *London*, *per Opinionem Curiæ*. And iſſue was taken if the obligation was made and remained in *London*, at the time of the debt, or in *Ireland*; but the iſſue by the folly of the pleader was joined, if the obligation was made in *London, viz. in Paroc' Beatæ Mariæ de Acubus, in Warda de Cheape*, and the truth was, that it was *in Paroch' Sancti Foſteri, in Warda de Farindon infra*, and not *in Paroch' & Warda prædict'*, and

ſo

ſo found by the jury; *Et ideo non habuit judicium* *Dyer* 305. *Pl.* 58. *Quere.*

Where the executor dieth before the probate of the *will*, his executor ought not to take upon him the execution of the firſt teſtament, but the adminiſtration of the goods of the firſt teſtator, with the teſtament annexed, is to be committed to the executor of the executor, if the reſidue of the goods of the firſt teſtator (the legacies being paid) were bequeathed by his laſt *will* to the firſt executor, or to ſuch other perſon or perſons to whom the ſaid reſidue was bequeathed, or elſe to the next of blood to the firſt teſtator demanding the ſame; and this (*Ex relatione Doctoris Drury, Judicis Curiæ Prerogativæ Cantuarien'*) is the uſe and cuſtom of the ſaid court, and agreeable to law; to which the court gave credit. *Dyer* 372. *Pl.* 8.

Although the executors are not named in an obligation, yet the law will charge them, for that they repreſent the eſtate of the teſtator: the law is the ſame of adminiſtrators, but the heir ſhall not at any time be charged without expreſs mention of the heir. *Dyer* 23 *ſect.* 142. *Vide ante Wentw.* 34.

Adminiſtrator ſells a term; ſome years after an executor appears, and made oath in the archbiſhop's court, that he never heard of the teſtator's *will*, and renounceth, and the ſale of the term was adjudged void; for the granting of adminiſtration by the ordinary is void where there is an executor named. But this may be inconvenient; for then it cannot be ſafe to purchaſe under an adminiſtrator. 2 *Mod. Rep.* 146. *Abraham* againſt *Cunningham*. *Vide poſt. p.* 147.

The

The archbiſhop ſhall grant adminiſtration of the goods of one dying inteſtate beyond ſea. *Rolls* 908.

Adminiſtration granted by a commiſſary being a bachelor at law, and not a doctor of law, is good notwithſtanding the ſtatute of 37 *H. c.* 17. which is in the affirmative, that doctors of the civil law may be commiſſaries though they are married, but is not in the negative that no other be commiſſaries; and if a bachelor could not be commiſſary, yet acts done by him as commiſſary are good till avoided by ſentence: and the court held, that if letters of adminiſtration be granted to one, and after granted to another, by this the firſt are not avoided, except by judicial ſentence. *Cro. El.* 315. *Hill.* 36 *El. Prat.* v. *Stocke.*

If an appeal be to judges delegates to repeal the probate of a *will* in an inferior dioceſs, they may examine the appeal, and repeal the ſentence for the *will*, and adjudge he died inteſtate, but cannot grant adminiſtration to whom it belongs, but that muſt be done by the king. *Bulſtr.* 2, 3, 4. This is intended where there was a former appeal to the archbiſhop; ſo if after ſuch appeal to the delegates, there had been a further appeal to the king in the court of chancery, by the ſtatute of 25 *H.* 8. *c.* 19. and the *will* had thereupon been alſo diſproved, the adminiſtration is to be granted of the inteſtate's goods by the king. *Mich.* 24 *Eliz. in Banco. Godbolt.*

Brown made his *will* in writing, and conſtituted *D.* and three others his executors in truſt for *M. B.* an infant, and died; adminiſtration with the *will* annext was granted to *D.* one of thoſe

thoſe executors, *D.* by his *will* makes the plaintiff his executor and dies, and adminiſtration with *Brown's will* annext is granted to *Munn* the defendant during the minority of the ſaid *M. B.* and to the uſe of *M. B.* and *Munn* puts in a caveat againſt the plaintiff's proving the *will* of *D.* until *Munn*, by force of a commiſſion granted to him, had appraiſed the goods of *D.* and had inſpected all his books, papers and writings; the plaintiff appealed to the delegates, where *Munn* put in his allegations; and all this matter being ſuggeſted and read in *B. R.* a *Mandamus* was prayed and granted to compel the judge of the prerogative court, that the plaintiff might prove the *will* of *D. Raymond* 236, 237. See *F.N.B.* 200. That a writ lies to compel the mayor of *Oxford*, or any ordinary, to prove a *will.*

Adminiſtrator of *J. S.* brought debt upon a bond and obtained judgment, and afterwards the adminiſtration is revoked, yet the plaintiff proceeded and took the defendant in execution: by motion the defendant was diſcharged, and the execution was void; for when the ground of his ſuit is overthrown, *viz.* his commiſſion, he hath no authority to proceed further, and the execution iſſued without warrant, 1 *Brownl.* 91. *Barnehurſt and Yelverton. Yelv.* 83.

Adminiſtrator releaſeth all actions, afterwards the adminiſtration was revoked and declared void by ſentence; the releaſe is void. *Throckmorton and Hobby.*

Admi-

Adminiſtrator, during the minority of an executor ſhall be named adminiſtrator of the goods of *T. C.* during the minority of the executor of the ſaid *T. C.* late executor of *E. C.* and ſhall not be named adminiſtrator of the goods of *E. C.* not adminiſtred by *T. C.* But had the infant been defendant, he ſhould have been named but executor of the executor, for the reſt follows, but the committing of adminiſtration is of both. *Hobart* 246. *Norton's caſe.*

An action was brought againſt the defendant as adminiſtrator during the minority of *J. S.* and the plaintiff ſhews in his count, that the ſaid *J. S.* at the time of the writ was, and yet is, under the age of 21 years; and verdict *pro Quer.* But judgment was arreſted, for the declaration was inſufficient, becauſe the adminiſtration ceaſeth at 17, ſo that he may be 18, 19, or 20 years of age, and yet the adminiſtration ceaſeth, and ſo doth the action againſt ſuch adminiſtrator, according to the reſolution in *Pigot's* caſe. 2 *Brownl.* 247, 248. *Brownhead and Spencer.*

Lake declared as adminiſtrator of *N.* during the minority of the exexecutor of *N.* (with the *will* annext) brought debt upon a bond made by the defendant to *N.* but did not ſhew in the declaration expreſly, that ſuch adminiſtration was committed to the plaintiff, and he brought in court *Literas Teſtamentarias*, not ſaying, *Literas Adminiſtratorias.* After verdict judgment was given for the detendant, becauſe the plaintiff had not well entitled himſelf to this action; and it was reſolved, that this was not aided by

any

any ſtatute of jeofails, though after verdict. *T. Jones* 193.

In debt on a bond againſt *J.* and his wife as adminiſtratrix, the defendant pleads payment by the wife after the inteſtate's death, and on that iſſue found *pro Quer'*. Judgment was, *Quod recuperet Debitum* againſt them *De bonis Teſtatoris, & ſi non, &c.* the damages, *De bonis propriis. Per Curiam:* The judgment is well given. 1. Although the plea be falſe, yet he is altogether a ſtranger to the teſtator, and therefore the judgment ſhall be only *De bonis Teſtatoris*, as where he pleads fully adminſtred, which is falſe in his own conuſance. 2. Although the wife hath not any goods during the coverture, yet becauſe the huſband is only charged in reſpect of the wife, and ſhe might have goods if ſhe ſurvived, and execution might be taken againſt her, the judgment is good. *Cro. Jac.* 191. *Johns and Adams, Mich. 5 Jac. B. R.*

A prohibition was prayed to the admiralty (among other reaſons) becauſe a ſuit was brought there by the huſband as adminiſtrator of his late wife, who died inteſtate, who was executrix of *J. S.* her firſt huſband, upon a ſtipulation of 200*l.* penalty made to *J. S.* whereas that ſuit ſhould be by the adminiſtrator of the goods of *J. S.* not adminiſtred by his late executrix, and the proceedings in the admiralty were ſtayed by the conſent of the executrix's ſecond huſband, who was plaintiff in the admiralty. *Hardres* 473.

I will that *W.* ſhall be my adminiſtrator, or have adminiſtration of my goods with *N.* my executor: by this *W.* and *N.* are joint executors. 21 *H.* 6. 6. *vide ante Wentw. p.* 9.

A. is

A. is cited to prove the *will*, and does not come in, and adminiſtration is granted to *N.* of *B.* if after *A.* proves the *will*, the adminiſtration granted to *N.* immediately ceaſeth; but all lawful acts done by *N.* before ſuch probate binds *A.* and yet if adminiſtration had been granted to *N.* without citing the executor to prove the *will*, or before the time given to *A.* to prove it, then no act of ſuch adminiſtrator would bind the executor. 3 *H.* 7. 14. Vide Plow. Com. 281. b. 9 Rep. 37. b. Henſloe's caſe.

Sir *T. H.* was poſſeſt of divers leaſes, and had iſſue *W.* and *T.* his ſons, and makes *W.* his executor, and dies, and his *will* run thus: *All the reſidue of my goods, debts and legacies being paid, I give to my executor. W.* marries, proves the *will*, and makes election to have a tenement parcel of the demeſnes, as legatee, and dies inteſtate before debts paid; the wife of *W.* ſhall have the adminiſtration, and not *T.* the ſon. So if executor die before probate, his executor may not take upon him the execution of the firſt teſtament, but adminiſtration ought to be delivered to him to whom the goods are bequeathed, otherwiſe to the next of blood. 2 *Roll. Rep.* 158. *Hinſon and Button*, 372. *a. W. Jones* 225.

Audita Querela, an adminiſtrator recovers damages in an action of *Trover* and *Converſion* for goods of the inteſtate taken out of the poſſeſſion of the adminiſtrator himſelf, then his adminiſtration is revoked; and the queſtion was, whether he ſhall have execution of the judgment, notwithſtanding the revocation of his adminiſtration? *Saunders:* I conceive he cannot, for the adminiſtration being revoked, his authority is gone. Dr. *Drurie*'s caſe in the 8th *Rep.* is plain, and there's a precedent in the new book

book of entries 89. *Barrel:* I conceive he may take out execution, for it is not in right of his adminiſtration; he lays the converſion in his own time, and he might in this caſe have declared in his own name; and he cited and urged the reaſon of *Packman*'s caſe, 6 *Rep.* 18, 19. and *Cro. Eliz.* 460. He might bring the action in his own name, but the goods ſhall be aſſets. If goods come to the poſſeſſion of an adminiſtrator, and his adminiſtration be repealed, he ſhall be charged as executor of his own wrong: now in this caſe the adminiſtration being repealed, ſhall he ſue execution, to ſubject himſelf to an action when done? *Twiſden*; I think it hath been ruled that he cannot take out execution, becauſe his title is taken away. *Judgment per Cur'* verſus *Defendentem.* 1 *Mod. Rep.* 62. *Turner & Davies.*

It hath been ſaid, that executors could not wave a term, (though if they could they ought to plead it ſpecially) for it is naturally in them, and *prima facie* is intended to be of more value than the rent; if it ſhould fall out to be otherwiſe, the executors ſhall not be liable *de bonis propriis*, but muſt aid themſelves by ſpecial pleading. *Mod. Rep.* 16. *Anonymus.*

The plaintiff had judgment in debt againſt *John Brooks* the inteſtate, and took out a *Fieri facias* bearing date the laſt day of *Trin.* term, *de bonis & catallis* of *John Brooks*; before the execution of which writ *John Brooks* dies, and *Eliz. Brooks* adminiſters, the ſheriff's bailiff executes the writ upon the inteſtate's goods in her hands. Upon this, ſerjeant *Baldwin* moves the court for reſtitution; for that a *Fieri facias* is a commiſſion, and muſt be ſtrictly purſued.

Now

Now the words of the writ are, *de bonis* of *John Brooks*; and by his death they ceaſe to be his goods. The plaintiff will be at no prejudice; the goods will ſtill remain liable to the judgment, only let the execution be renewed by *Scire facias*, to which the adminiſtratrix may plead ſomewhat. *Wyndham*: The property of the goods are ſo bound by the teſte of the writ, as that a ſale made of them *bona fide* ſhall be avoided; and ſince the inteſtate himſelf could not have any plea, why ſhould we take care that the adminiſtrator ſhould have time to plead? And of that opinion was all the court, after they had adviſed with the judges of the King's Bench, who informed them that their practice was accordingly. But *Vaughan* ſaid, that in his opinion it was clearly againſt the rules of law. But they ſaid there were caſes to this purpoſe in *Cro. Car. Rolls. Moor*, and 1 *Modern Rep.* 188. *Farrer and Brooks adminiſtrator of Jo. Brooks.*

But by the 29 Car. 2 the goods are only bound from delivery of execution to the ſheriff, which Stat. was made in favour of creditors; therefore as to the party they are bound from the teſte ſtill.

It was ſettled in the caſe of Sir *John Parſons* v. *The executors of Gill*, *Eaſter T.* 13. *W.* 3. *B. R.* That the writ of *fieri facias* being *teſted* in the life-time of *Gill* might well enough be executed upon the goods that were in the hands of his executors, becauſe by the *teſte* of the writ the property of the goods is bound againſt all perſons but purchaſers. Judge *Blencow's* M. S. *Rep. fol.* 196.

The ſame point, as againſt the party was alſo ſettled in Doctor *Needham's* caſe. *Eaſter T.* 3. *W. & M. B. R.*

A man dies leaving iſſue by two ſeveral venters, *viz.* by the firſt three ſons, and by the ſecond two daughters; one of the ſons dies inteſtate, the elder of the two ſurviving brothers

takes out adminiſtration; and Sir *Lyonel Jenkins*, judge of the prerogative court, would compel the adminiſtrator to make diſtribution to the ſiſters of the half-blood. He prayed a prohibition; but it was denied upon advice by all the judges; for that the ſiſters of the half-blood, being a-kin to the inteſtate, and not *in remotiori gradu*, then the brother of the whole-blood, muſt be accounted in equal degree. 1 *Mod. Rep.* 209. *Smith's caſe*

Debt upon an obligation againſt an adminiſtrator; the defendant pleads a ſtatute acknowledged by the inteſtate to the plaintiff, which ſtatute is yet in force. The plaintiff replies, that it is burnt. The defendant demurs, and by the opinion of *Wyndham*, *Atkins* and *Ellis*, againſt *Vaughan*, the plaintiff had judgment. 1 *Mod. Rep.* 186, 187. *Buckley* v. *Howard.*

A great inconvenience would enſue, if men were allowed to adminiſter as far as they would themſelves, and then to ſet up a beggarly adminiſtrator; they would pay themſelves their own debts, and deliver the reſidue of the eſtate to one that's worth nothing, and cheat the reſt of the creditors. If an adminiſtrator bring an action, it is a good plea to ſay, that the executor made by the *will* has adminiſtred. 1 *Mod. Rep.* 213. 214. *Parten and Baſeden's caſe.*

An executor's refuſal before the ordinary after adminiſtration, is a void act. 1 *Mod. Rep.* 213. *Parten and Baſeden's caſe. Vide ante Wentw. p.* 37, 38.

Adminiſtration was granted to the ſiſter of the half-blood of the inteſtate, and her huſband, by the prerogative court, and the brother of the whole-blood ſued there to have the letters repealed;

pealed; and upon motion for a prohibition, upon this ſuggeſtion it was agreed by the court, that the ſiſter of the half-blood is in equal degree of kindred with the brother of the whole-blood within the ſtatute. And ſo it was reſolved, 1 *Car.* between *Glaſcock* and *Wingate*, known by the name of juſtice *Yelverton*'s man's caſe. And if the ordinary hath once executed his power according to the ſtatute, he cannot repeal the letters upon a citation; but it was reſolved, that the ſtatute was not obſerved in the grant of the letters in this caſe, becauſe the huſband who is not of kin to the inteſtate is joined with the wife; and if ſhe ſhould die before him, he ſhould continue adminiſtrator againſt the meaning of the ſtatute. And for this cauſe a prohibition was denied; but it was ſaid, that if it had been granted to them only during the coverture, perhaps it might have been good, becauſe the huſband might have adminiſtred during the coverture, though it had been granted to the wife only. *Select caſes* 36. *Brown* and *Wood*.

Executors ſhall be intended conuſant of all contracts of the teſtator, as well contingent as certain. *Select caſes* 38. *Ecles* v. *Lambert*.

Executors where chargeable in the *Debet & Detinet*, where in the *Detinet* only. *Vide Select caſes* 43. *Roſton* v. *Cordrye*.

In an action of debt brought by an adminiſtrator the plaintiff declares of letters of adminiſtration granted to him *per Carolum Regem*, *&c.* without ſaying *debito modo*, *&c.* and upon a demurrer to the declaration it was adjudged good, becauſe the king hath univerſal juriſdiction here. *Select caſes* 53. *Hobſon* v. *Wills*.

Letters of adminiſtration of the goods of Sir *John Lamb* inteſtate, were committed by the prerogative court to the wife of *Hill*, being near to the inteſtate; and upon a ſuggeſtion of a ſuit there, by others of equal degree, for a diſtribution of the goods of the inteſtate, according to agreement made by the adminiſtrator, as was pretended. *Hale* prayed a prohibition, and it was granted; for the ſtatute *wills*, that adminiſtration be granted to the next of kin, for their advantage; and when the ordinary, *&c.* hath once executed his power according to the ſtatute he cannot alter it, nor hath any power to compel the adminiſtrator to make diſtribution notwithſtanding the agreement. And *Hale* ſaid, That the court there threatened to repeal the letters granted, unleſs ſhe would bring in a true inventory of the eſtate of the inteſtate, and give a true accompt of her adminiſtration; to which *Roll* anſwered, That the court there may cite her to bring in an inventory, and to give an accompt; but if it appear that they go about to repeal the letters for not doing it, you ſhall have a prohibition, which was not denied by *Bacon*. And *Hale* would have had a prohibition againſt all the couſins, as well thoſe that ſued there as others; becauſe the proceedings there being *ore tenus*, the reſt may join in the ſuit when they will, but the court denied to grant any prohibition, *Quia timet*, *&c.* *Select caſes* 56. *Hill & Uxor* v. *Bird*, *& alios*.

Where part of the arrears demanded were due in the time of the teſtator, and part after his deceaſe, the action in the *Detinet* was good for the whole, as well as if all had been due after the death of the teſtator. And that after

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a verdict *Quod non Detinet*, the land ſhall not be intended of any value, as it is well known in theſe times, in many places, lands have been of no value, and yet the executor is liable as to the rent as far as he hath aſſets, and clearly if he hath aſſets he cannot wave his term. *Select caſes* 76. *Corniſh* v. *Cowſey*.

Debt againſt adminiſtrator, the point upon demurrer by the defendant was, whether the plaintiff ought to ſhew the name of him who granted adminiſtration to the defendant. *Sæis*, who demurred, cited *Cro. Jac.* 10. *Caſe de Wade & Atkinſon*, 11 *H.* 4. 71, 72. *Vet. Intrat.* 300 *and* 302. *Cur.* The allegation by the declaration that adminiſtration was committed to the defendant *Debita juris forma* ſufficeth, without ſhewing by what ordinary. *Judgment pro Quer.' Sir Tho. Jones* 1. *Therold* v. *Baily*.

Paſ. 1 Jac. in Cam. Scacc. Judgment in debt againſt an adminiſtrator reverſed, becauſe he does not ſhew by whom adminiſtration was committed, for he may as well take conuſance by whoſe means he is adminiſtrator, as that he is ſo. Cro. Jac. 10. pl. 13.

The defendant pleaded adminiſtration committed, and that he retained for ſatisfaction of a debt due to him by obligation; upon which the plaintiff demurred, and ſhewed, that it doth not appear that adminiſtration was committed to the defendant, and then he had no colour to retain. *Judgment pro Quer'*. for the plea is inſufficient. *Sir Thomas Jones* 23. *Caverly* v. *Elliſon*.

The plaintiff declared as adminiſtrator during the minority of ſix, and ſheweth that five were under ſeventeen, and that the ſixth had attained eighteen. The defendant demurred. *Foſter pro Quer'*. the declaration is good notwithſtanding the caſe of *Pigot*, 5 *Co.* 29. For that caſe was adjudged according to the uſage of the judges of the ſpiritual law then in uſe, but now by the Stat. of 22 & 23 *Car.* 2. *cap.* 11. the law is altered in this point, and no adminiſtration

may be granted, but to perſons of the age of 21 years; for the ſtatute requires bond to be given by the adminiſtrator, which may not be by an infant. *Cur' contra.* The adminiſtration is determined, and the ſtatute hath not altered the law in this point. *Judgment quod nil capiat per billam. Sir Thomas Jones* 48. *Joyner* v. *Watts.*

Adminiſtration granted before the renunciation of the executor, although he renounce after, the renunciation ſhall not make the adminiſtration good by relation, for it was void, not voidable only. 10 *Co* 62. *a. Sir Tho. Jones* 73. *Abraham* v. *Conningham. Vide hic ante* 135.

Poſt. 155.

Vide ante 158.

Upon a *Scire facias* out of the chancery againſt the defendant as adminiſtrator for 800 *l.* debt due by his inteſtate, upon a recognizance acknowledged before Sir *John Keyling*, chief juſtice of the King's Bench; it was returned, that by inquiſition it was found, that the defendant had waſted the goods of the inteſtate, and converted them to his own uſe to the value of the ſaid debt; upon which the defendant appeared and traverſed that he had waſted, and iſſue joined thereupon, and a ſpecial verdict was found to this effect, that before adminiſtration committed to the defendant, *John Hope* took into his hands all the goods of the inteſtate (*ultra* 220 *l.* value) and had diſpoſed and converted them to his own uſe That the defendant after adminiſtration, ſued the ſaid *Hope* for recovery of the goods, or the value of them, and pending the ſuit; the defendant and *Hope* covenant mutually by articles ſealed by each of them. 1. That the ſaid *Hope* ſhould deliver all the goods not ſold by him in *Specie* to the defendant, *&c*, and the defendant covenanted that he would defend

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at his coſts all ſuits, and ſave *Hope* indemnified againſt all judgments and damages upon the ſaid ſuits; and moreover it was found that *Hope* had not paid any money covenanted to be paid to the defendant, and that the defendant for non-payment had ſued the ſaid *Hope*, and arreſted him, and that he was yet in cuſtody upon the ſaid ſuit; and moreover that the defendant had waſted the ſaid goods to the value of 220 *l.* but as to the reſidue of the goods due, which *Hope* himſelf had poſſeſſed, the advice of the court was prayed; and the queſtion in law was, whether the defendant by theſe articles had made himſelf liable to a *Devaſtavit* for the money not paid to him; and after divers arguments, it was reſolved by the court, that it was a *Devaſtavit*, and that the adminiſtrator ſhall be charged, for the property of the goods was changed by this agreement, for the defendant had accepted of the ſaid covenant, for the goods which operated as a ſale by him, and otherwiſe *Hope* ſhall be twice charged, and it was the folly of the defendant to make ſuch contract. And judgment was given for the plaintiff. *Vide Yelverton, fol.* 10. *Caſe de Goring, and Sir Tho. Jones* 89. *Norden* v. *Levet.*

Debt upon obligation by an adminiſtrator, *durante minore ætate* of an executor *cum teſtamento annexo*; the plaintiff declared, naming himſelf as aforeſaid, but did not ſhew in the declaration that adminiſtration was committed to him; but *profert Literas Teſtamentarias*, without ſaying, *Literas Adminiſtrationis*; after verdict for the plaintiff, *Pollexfen* moved in arreſt, that the plaintiff had not intitled himſelf to the action,

for that he had not alledged that adminiſtration was committed to him, *Withins.* After verdict it is aided by the late ſtatute of jeofails. *Cur' contra*; and judgment, *Quod nil capiat per Billam. Sir Tho. Jones* 193. *Lake* v. *Thacker.*

Debt againſt adminiſtrator or executor upon a *Devaſtavit*, there muſt be a judgment too to ground the action. *Calthrop* 2. *Burrel* v. *Richmond and his Wife, adminiſtratrix of Jonathan Bennet.*

Hughs adminiſtrator of *Charles Hughs* of *London* deceaſed, is plaintiff in a prohibition, and ſets forth his caſe upon 21 *H.* 8. and that the inteſtate was poſſeſt of goods and chatels to the value of 12000*l.* and died the 10th of *March*, 1666, and the 10th of *April* after, he having *Bona notabilia*, adminiſtration was committed to his ſon the plaintiff. That the plaintiff being adminiſtrator did give bond with ſureties, and that for true adminiſtration the bond is ſtill in force, and he ſaith all the goods do belong to the perſon that is adminiſtrator; and that he the adminiſtrator ought to have the full and ſole power to diſpoſe the goods, and the remainder to himſelf; and he ſaith, he being no ways compellable by any law to come to any diſtribution of thoſe goods, he was yet called into the court Chriſtian by the defendant his ſiſter, daughter of the deceaſed. To this the defendant pleads, ſhe did not proſecute after the prohibition, and for a conſultation ſhe takes by proteſtation, that the plaintiff is not to have the goods ſolely. For plea ſhe ſaith, that when any perſon dies inteſtate, and adminiſtration is granted, the adminiſtrator

miniſtrator is to render accompt; and of the ſurpluſage, by the ancient law of the kingdom, to allow ever child a reaſonable portion; and that there remains of Dr. *Hughs*, her father's eſtate, 3000 *l.* unadminiſtred, and ſhe being a daughter unadvanced doth call upon her brother for a ſhare into the Eccleſiaſtical Court; and upon this he demurs.

Debt againſt executors; the executors plead judgment, and no aſſets *ultra*. The plaintiff replies, they are kept on foot by fraud. The defendant ſaith, he did not keep the judgments on foot by covin; and becauſe he ſaith not, *nor any of them*, adjudged naught. *Calthrop* 192. *Richfield and Uxor* v. *Udal.*

The teſtator by obligation was bound to the plaintiff in 40 *l.* to be paid upon demand, and that he required the teſtator in his life-time, and the defendants, ſince his death to pay, and that they have not paid it. The defendants plead ſeveral pleas; *R. H.* pleads in abatement, that Sir *Andrew Corbet* died inteſtate, and that the biſhop granted to him letters of adminiſtration, and ſaith, that he was never executor, but adminiſtrator, and demands judgment of the writ. To this it is demurred, becauſe he doth not ſhew the letters of adminiſtration. The other two defendants ſay, fully adminiſtred on the 27th day of *March*, 1664, and that before the ſaid 27th of *March*, they had no notice of this action brought by the plaintiff, and that from and after that time they had not aſſets. Upon this the plaintiff demurs, and after divers arguments judgment was given for the plaintiff. *Calthrop* 227. *Mellor* v. *R. H. Mary Overton & W. H. executors to* Sir *Andrew Corbet.*

Title

Title being made to a term by one as adminiſtrator, and no adminiſtration produced, the book of the eccleſiaſtical court where it was granted being produced, in which was entered the act or order of the court for granting of it, it was allowed good evidence; and *Twiſden* ſaid, that ſo it was in the caſe of the Earl of *Mancheſter*. 1 *Levinz*. 25. *Garrett* v. *Liſter*, *Vide* 135. *poſt*.

By *Twiſden* and *Wyndham*, juſtices, it was held, that where a man dieth inteſtate, having goods in ſeveral peculiars, that the granting of adminiſtration doth not belong to the ordinary of the dioceſs but to the metropolitan of the province, for they are exempt from the ordinary juriſdiction. 1 *Levinz Rep*. 78. *Vide ante Wentw*. *p*. 46.

Debt for rent as adminiſtrator, the defendant pleaded, that adminiſtration granted to the plaintiff was *Debito modo* revoked and granted to *J*. *S*. The plaintiff replied, that he was next of kin to the inteſtate, and that he had ſued an appeal from the ſaid ſentence; and after divers arguments in ſeveral terms, it was agreed by *Kelyng* and *Twiſden*, that adminiſtration might be revoked for juſt cauſe, as if it were unduly granted contrary to the ſtatute at firſt, or if the adminiſtrator afterwards became diſabled by lunacy; but it was adjourned, and long depended. But afterwards *Levinz* ſaith (as he heard) judgment was given for the plaintiff, becauſe by the appeal the ſentence of revocation was ſuſpended. 1 *Levinz* 157. *Price* v. *Parker*.

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It was agreed by all the four judges in the King's Bench, that where the ordinary hath granted adminiſtration according to the ſtatute, that he may not revoke it without cauſe, becauſe the grantee hath an intereſt in the goods by the ſtatute, which the ordinary may not take from him without cauſe; but for good cauſe it ſeemed to them all that he might, as if the adminiſtrator become lunatick, *&c.* and *Morten* and *Wyndham* ſaid, that the granting pending the *caveat* was cauſe to revoke it. And they ſaid, that the judges delegates are the proper judges of what validity the *caveat* ſhall be according to their law; and it ſeemed to them, that it is as a ſuperſedeas in our law, and that as judgment given after it in our law, is erroneous; ſo it is in their law after a *caveat*: But be it ſo or not, it is to be adjudged by the delegates, who are the proper judges of this matter of proceeding in their courts touching a matter eccleſiaſtical which belongeth to their courts, and not to this court, which is not appriſed of their forms and manner of proceeding. And for that cauſe they held the prohibition ill granted, and that a conſultation ought to be granted: But the court being divided it remained as before as to the prohibition. 1 *Levinz.* 186. *Offley* v. *Beets.*

Adminiſtrator *De bonis durante minore ætate J. S.* obtained judgment, and in a *Scire facias* againſt the bail he pleaded that *J. S.* was now of full age; upon which the plaintiff demurred, and adjudged no plea. For this recognizance is to the plaintiff himſelf by name; although that he had the adminiſtration *durante minore*

ætate

ætate tantum, and the coming of the infant to age ſhall not hinder the plaintiff to ſue the *Scire facias* againſt the bail. But by *Hale*, if he had taken execution upon the principal judgment, after the infant came to age, it had been a doubt, whether it ought to be ſued by him, or by the infant. 2 *Levinz* 37. *Embrin* v. *Mompeſſon*.

Where adminiſtration granted to the next of kin, when there is reſiduary legatee, is revocable or not. *See* 2 *Levinz Rep.* 55. *Thomſon* v. *Butler*.

It was ſaid by *Hale*, and by none denied, if a man die having goods in the ſeveral provinces of *York* and *Canterbury*, ſeveral adminiſtrations ought to be committed, and ſo it is if in *England* and *Ireland*. 2 *Levinz* 86. *Shaw* v. *Stoughton*. *Vide ante p.* 46. *Wentworth*.

Adminiſtration was granted, and the adminiſtrator poſſeſſed of a term by virtue of it, and made a leaſe, then came a citation to repeal this adminiſtration; and it was affirmed, of which ſentence of affirmation there was an appeal ſued, and the ſentence of affirmation was repealed, and the firſt adminiſtration repealed, and adminiſtration granted to another. By *Hale*, *& totam curiam*, this new adminiſtrator ſhall not avoid the leaſe made by the firſt adminiſtrator; for that is no more than a repeal of the ſentence in the citation, and ſo of the nature of the ſuit in the citation, and ſo is all one as if the firſt adminiſtration had been avoided in the ſuit upon the citation, and not as if the appeal had been brought originally upon the firſt adminiſtration, by which it had been totally annulled. 2 *Levinz* 90. *Semine*

90. *Semine* v. *Semene. Co.* 6 *Rep.* 18, 19, *Packman's caſe.*

In a prohibition the caſe was, a man died inteſtate having *A. B.* and *C.* brothers of the whole-blood. and *D. E.* and *F.* of the half-blood; adminiſtration is committed to *A.* and the ordinary would bind him to a diſtribution equally between all of the half-blood, and the whole-blood; and it was argued at bar in ſeveral terms, and for the prohibitition it was ſaid, that of acts of parliament the judges of the common law ought to judge, and the half-blood is not regarded at common law, nor may they be heir the one to the other, nor may the teſtator or inteſtate be preſumed to have ſo great affection to the half-blood as to the whole-blood. Therefore it is not reaſon that the ordinary ſhould give him equal part of his eſtate; and the ſtatute law being ſilent, whether the half-blood be of kin, but only appoints the diviſion to be between the kin of equal degree, it ought to be determined by the common law, which is of kin, and which is the equal degree; and by them were cited *Fitz. Deviſe* 9. 2 *Rolls* 303. And for the conſultation it was ſaid, that this ſtatute being for diſtribution of things teſtamentary only, it ought to be expounded by their law; and the brother of the half-blood is brother, as well as the brother of the whole-blood, and of that our law taketh notice. *Ergo*, the brother of the half-blood may be guardian, as *Owen* 128. *Cro. Eliz* 825. *Swan* v. *Gatland*; and the ſtatute is, that they ought to diſtribute according to the law in force; and our law doth not

Cro. El. 825. Swan v. Gatland, Paſ. 43. El. C. B. The brother of the half-blood had the guardianſhip, being the neareſt of kin to whom the inheritance could not deſcend before the mother's brother.

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mention any diſtinction. *Ergo*, the law in force ought to be intended the canon law; and they cited alſo 2 *Rolls* 303. and *Styles* 74, 75. and *Trin. Ter.* 29 *Car.* 2. it was ſaid at bar, that the eccleſiaſtical court doth give to the half-blood half ſhares, which *Rainsford* and *Wild* held reaſonable; and afterwards, *Mich.* 29. conſultation was granted, but *Quer'* If generally or with an *Ita quod*, they give half ſhare to the half-blood; for always afterwards it was their conſtant practice to divide equally between the half and whole-blood, and that hath been approved in the courts of *Weſtminſter* ſince. 2 *Levinz* 173. *Tracy* v. *Smith*.

Vide hic ante 135. 147.

The ordinary granted adminiſtration where there was a *will* and executors, although it was concealed, void and not made good by the renunciation of the executor afterwards. *Levinz Rep.* 2 *part* 182. *Abraham* v. *Conningham*.

Debt for rent by the leſſor againſt the adminiſtrator of the leſſee, he pleaded, that before the rent due he had aſſigned the term; upon which the plaintiff demurred, and after divers arguments it was adjudged for the plaintiff; for the privity of the contract continued between the leſſor and the adminiſtrator of the leſſee, as it was between the leſſor and leſſee themſelves; and it is not contrary to *Overton* and *Sidal*'s caſe, cited in *Walker*'s caſe, 3 *Co.* 24. and in *Pop. Rep.* 120. *Cro. Eliz.* 555. and *Windham* ſaid, that an executor may not waive a term ſo, but that he ſhall be charged for the rent if he have aſſets; for he is obliged to perform all contracts of the teſtator if he hath aſſets, be the rent above the value of the land or not, which was not denied;

nied; and *Kelyng* ſaid, he may not ſo waive, but that he ſhall be charged in the *Detinet*, upon which the aſſets will come in queſtion; and if he continue in the poſſeſſion he ſhall be charged in the *Debet & Detinet*, in reſpect of the perception of the profits, hath he aſſets or not, to which *Twiſden* agreed. 1 *Levinz* 127. *Helier* verſus *Caſebert*.

Debt for rent as adminiſtrator of an adminiſtrator of a leſſee for 30 years, who demiſed to the defendant for 20 years rendering rent; and that the firſt adminiſtrator had paid debts of the firſt inteſtate to the value of the term; upon which the defendant demurred, becauſe the plaintiff did not ſhew that the firſt adminiſtrator had paid the debts with his own proper money, and it might be that he paid them out of the money of the firſt inteſtate; for which the court held the declaration ill; but it being moreover declared, that he choſe and took the term in ſatisfaction, the court held it a ſtrong implication, if not a plain averment, that he paid them with his own proper money; and afterwards judgment was given for the plaintiff. 1 *Levinz* 154. *Baker* v. *Berisford*'

Debt as adminiſtrator againſt the defendant, leſſee for years for rent, and counts of a leaſe made to the inteſtate, and he being poſſeſſed demiſed to the defendant rendering rent, and brought the action in the *Debet & Detinet*; and the defendant pleaded, that the inteſtate before the leaſe to him had aſſigned his term, and traverſed that the inteſtate was poſſeſſed when he demiſed to the defendant; iſſue upon it, and verdict for the plaintiff, and it was moved

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in arreſt, &c. That the declaration by an adminiſtrator in the *Debet & Detinet* lieth not, for although that in debt againſt an adminiſtrator he ſhall be charged in the *Debet & Detinet*, as *Hargrave*'s caſe is in reſpect of his poſſeſſion, yet in an action by an adminiſtrator of a man who had a term and made a leaſe and the reverſion goes to the adminiſtrator he ſhall ſue for the rent in the *Detinet tantum*, becauſe all *that* which he ſhall recover ſhall be aſſets; but where the executor is ſued, he, in reſpect of the poſſeſſion and profits of the land taken by himſelf, ſhall be charged *De bonis propriis*; and ſo the court held, that the declaration was not good, but it is help'd by the verdict by the Stat. *de Jeofails* made at *Oxford*. *Levinz* of council for the defendant. 1 *Levinz* 250. *Frevin & Uxor* v. *Peynton*.

Aſſumpſit upon a promiſe of the teſtator for 1000 *l.* the defendant pleaded a recognizance in chancery for 2000 *l.* and ſeveral judgments againſt himſelf after exhibiting the bill, and pleaded payment of them ſeverally, and pleaded ſeveral obligations to ſeveral perſons, and payment of them after exhibition of the bill, and that he had fully adminiſtred, and that he had not at any time after the bill any goods, except *Bona ad valentiam* of the ſeveral ſums paid upon the ſeveral judgments and obligations *Et præterquam bona ad valentiam* 5 l. *que onerat' exiſtant' & non ſufficiunt ad ſatisfaciend' le recognizance.* The plaintiff replied, *Proteſtando*, that the judgments were had by fraud and covin; *pro placito* he ſaid, that the defendant paid not the money upon the ſaid judgment to *A.* nor upon the ſaid judgment to *B. & ſic de cæteris*; and

and in like manner he pleaded non-payment ſeverally of the ſaid ſeveral ſums upon the ſaid ſeveral obligations, omitting ſome, *Et de hoc ponit ſe ſuper patriam.* And as to the recognizance it was ſatisfied and kept on foot by fraud and covin, upon which the defendant demurred; and now he excepted to the replication. 1. Becauſe it was double and manifold, putting all matters in iſſue where non-payment of *one* would have made an end of all, but *Non allocatur*, for the plaintiff hath election to traverſe one only, or every one; for he might be miſtaken in one, and therefore it is good to traverſe ſo many of the matters as he pleaſeth; and ſo it was done in *Treching*'s, caſe, and *Turner*'s caſe 8 *Co. Rep.* and all preſidents are ſo. 2. The pleading *Non ſolvit* to the one, nor to the other, *&c.* then *Et de hoc ponit ſe ſuper patriam* is good, for they are ſeveral iſſues under the *Et de hoc ponit ſe*, *&c.* and not one multiferous iſſue, as was objected. 3. The omiſſion of pleading to ſome of the ſums paid upon the obligations hurts not; for he may plead to as many of them as he pleaſes and omit the others. 4. Although that he miſtook ſome of the ſums to which he pleaded *Non ſolvit*, it hurteth not; for it is no more than if he had ſaid nothing to them; and judgment was given for the plaintiff. 1 *Levinz.* 281. *Jeffries* v. *Dee*, *Adminiſtrator de Everard.*

Aſſumpſit, and called herſelf adminiſtratrix of *J. S.* and declared, that the defendant was indebted to her 300 *l.* but did not ſay indebted to her as adminiſtratrix; but then declared of another debt due to her as adminiſtrator: and

that upon an accompt between them, the defendant was found indebted to her other 30 *l.* and promiſed to pay the ſame; and upon *Non Aſſumpſit*, a general verdict, and entire damages, upon which it was moved in arreſt of judgment, that the firſt promiſe is, and ought to be intended of a debt due to the plaintiff *in proprio jure*, although that ſhe named herſelf adminiſtratrix, *& in fine narrationis*, produced the letters of adminiſtration, yet it was only to warrant the ſecond account which is *in jure inteſtati*. To which it was anſwered, admitting the firſt promiſe to be *in jure proprio*, yet the laſt being upon an accompt with herſelf, and the promiſe was to herſelf in her own time, they may well be joined in one declaration; and one general verdict and entire damages alſo might well be intended after verdict, that the firſt debt was due to her as adminiſtratrix, although that it was not ſo expreſly ſaid; and judgment given for the plaintiff. *Twiſden Totis Viribus e contra.* 2 *Levinz* 110. *Curtis* v. *Davies.*

Debt for arrears of rent as executor, and alſo as adminiſtrator, *durante minore ætate* of his co-executor; and declared, that the teſtator made the plaintiff and the other co-executors, and that *J. D.* ſeiſed of a rent of 20 *l. per Ann.* deviſed it to three perſons in equal parts in common, and that all the three deviſees levied a fine thereof as to one moiety to the wife of the teſtator in fee, and as to the other moiety to the uſe of a ſtranger in fee, and that the ſtranger granted his moiety to the wife of the teſtator in fee, by whom the teſtator had iſſue, and the wife died; whereupon the teſtator was ſeiſed

ſeiſed in the whole by the curteſy of *England*; and that the rent became due to the teſtator, who made him and the other his co-executors, and that he alone proved the *will*, and had adminiſtration granted to him during the minority of the co-executor, who is yet within age. Upon which declaration the plaintiff demurred; and now for the defendant two things were inſiſted on. 1. That this rent being a charge is againſt common right, and cannot be ſo divided, and thereby to make the terre-tenant ſubject to ſeveral diſtreſſes without his aſſent; and here is no attornment, *Co. Lit.* 148. *a.* otherwiſe it is of rent-ſervice of things which are of common right. *Hob.* 25. Grantee of a rent granted part by fine, the tenant is not obliged to attorn: therefore here the deviſe and the fine to the uſes divided is not good. Agreed, that to the deviſe, or to the fine to uſes attornment is not neceſſary; but a deviſe or fine to uſes of things not dividable may not divide them, but the deviſe and the fine to uſes is for that reaſon void. 2. Both executors ought to join in the action. although that one alone proved the teſtament, and executor and adminiſtrator to the ſame perſon are inconſiſtent; for where there is an executor the ordinary hath no power to grant adminiſtration. 9 *Co. Henſloe's caſe, and Yelverton* 30. *Smith* v. *Smith* and *Cunningham's caſe* adjudged laſtly. To which it was anſwered by the counſel of the plaintiff, and reſolved by the court, 1. That by theſe conveyances of deviſe and fine to uſes, the rent may be divided without the aſſent or attornment of the party,

becauſe his aſſent or attornment is not requiſite for the perfection of theſe conveyances. 2. Where one of the excecutors is an infant, and may not prove the *will*, adminiſtration *durante ſua minori ætate* may be granted to the other, who alone ſhall bring the action; and it is not inconſiſtent that he ſhall have the adminiſtration in ſuch caſe; for that it is not granted as upon one dying inteſtate, for the *will* is proved, but only to enable him to ſue alone; becauſe that the other is not capable of proving the teſtament, and ſo not to join with him, and he may not ſue alone. 2 *Levinz* 239, 240. *Colborne* v. *Wright.*

Aſſumpſit againſt defendant as adminiſtratrix to her huſband for 20 *l.* 10 *s.* the defendant pleaded that the inteſtate was bound in a ſtatute of 2000 *l.* to *Cordel*, *pro vero & juſto debito minime ſoluto.* The plaintiff replied, that *Cordel* ſued an extent and *Liberate* upon the ſtatute, and had lands delivered and accepted by him, and the return of the writ *prout patet per recordum.* The defendant rejoined, that the ſheriff who returned the writ was removed from his office, by which the return was void. The plaintiff demurred generally, and had judgment; for *per Cur' Cordel*, by accepting the lands upon the *Liberate*, was concluded to have other execution againſt the goods of the dead, and ſo the adminiſtratrix is not chargeable upon the ſtatute. *Fitz. Execution*, 84. 2 *Cro.* 694. and 15 *H.* 7, 15, 16. *Delenham's caſe.* And this very point was reſolved lately in the Court of Common Pleas, between *Johnſon* and *Young*, for the preſumption, that by the acceptance of the lands the ſtatute is ſatisfied; and as to the plea, that the ſheriff

ſheriff was removed before the return, it is contrary to the record, and not receivable; for which the plaintiff had judgment. 3 *Levinz.* 269. *Barker* v. *Dye*, *Adminiſtratrix of Dye*; *Paſ.* 2 *W. & M.* in *C. B.*

Gale had judgment in the Common Pleas after verdict againſt *Till* an adminiſtrator, who brought a writ of error thereupon in *B. R.* where the judgment was affirmed. And the queſtion there was, whether the plaintiff in the action ſhould have coſts upon the affirmance of the judgment in the writ of error, upon the *Stat.* 3 *Jac.* and that he ought to have coſts were cited 1 *Cro. Atky* v. *Herd. & ibid. Peccaſh's caſe*, *Hut.* 78, 79. *Latch.* 221. this bringing of the writ of error being his own act. *Cur' ſemble*, no coſts ſhould be. For they ſhall not find bail upon the writ of error upon the ſame ſtatute; but they would adviſe. *Levinz*, of council for the plaintiff in the original action, was ſatisfied with the opinion of the court, and did not move it further. 3 *Levinz* 375. *Gale* v. *Till.*

Debt upon obligation againſt the defendant as heir, who pleaded that adminiſtration to the anceſtor was committed to *I. S.* who had taken adminiſtration, and had aſſets. The plaintiff demurred, and upon argument had jndgment; for the plaintiff hath election to ſue the one or the other. 3 *Levinz* 189. *Davies* v. *Churchman*, 36 *Car.* 2. *C. B.*

Vide 1 Lev. 13, 26, 92 & 232, & Stat. 3 & 4 W. & M. c. 14. which is for relief of creditors againſt fraudulent deviſes.

Debt againſt the defendant adminiſtrator, and declares upon a demiſe to the inteſtate for 129 *l.* due in the life of the inteſtate in the *Detinet*, and for 64 *l.* in his own time in the *Debet* &

Vide 1 Sid. 266. 342. 1 Lev 128. 130, 224, 250. 2 Lev. 80. 2 Jo 169. Cro. El. 711.

840. Cro. Jac. 238, 549. Cro. Car. 225. Vide Lev. Ent. to. 52.

See 1 Wilſon 171, 172.

Detinet. The defendant demurred; and adjudged the action did not lie to charge him in the *Detinet* for part, and the *Debet & Detinet* for the other part, which requires ſeveral judgments; *ſcil. De bonis propriis* for the arrears in his own time, and *De bonis inteſtati* for the arrears due before his death, and the ſevering of the ſaid ſums in the declaration is not ſufficient, but he ought to have ſeveral actions. 3 *Levinz* 74. *Salter* v. *Cobbold adminiſtrator*, *Mich.* 34 *Car.* 2. *in C. B.*

Scire facias againſt the defendant as adminiſtrator of *Mary Sachwell*, againſt whom the plaintiff had obtained a judgment for 1700 *l.* and 5 *l.* damages, as adminiſtratrix to *Henry Sachwell* her huſband, *De bonis predict* Hen Sachwell *ſi tant' &c. & ſi non tant'. &c. dampna de bonis ſuis propriis*, and ſuggeſted that *Mary* had goods ſufficient of *Henry*, but that ſhe had waſted them. The defendant pleaded, that *Mary* had fully adminiſtred the goods of *Henry*, and traverſed the *Devaſtavit*, and *quoad* the 5 *l.* for the damages pleaded payment to the plaintiff by *Mary Sachwell.* The plaintiff *quoad* the firſt plea maintained the waſte, and thereupon iſſue, and *quoad* the 5 *l.* pleaded *Non ſolvit*, upon which alſo another iſſue. The jury *quoad* the laſt iſſue found for the plaintiff, that *Mary* paid not the 5 *l.* and *quoad* the firſt iſſue as to 314 *l.* 11 *s.* 5 *d.* that *Mary* had waſted; and they further found, that before the marriage between *Henry* and *Mary*, *Henry* covenanted with *Henry Norwood* to leave to *Mary* at his death 1000 *l.* and gave to *Norwood* an obligation for 2000 *l.* for performance of it; and that after marriage *Henry* died

died indebted to the plaintiff the ſaid 1700 *l.* for money had and received to his uſe, and afterwards died, and adminiſtration of his goods were committed to *Mary*; and that afterwards the plaintiff impleaded *Mary* for the 1700 *l.* and obtained the judgment *ſupra*. And that the 1000 *l.* not being paid to *Mary*, *Norwood* brought debt on the bond againſt *Mary* as adminiſtratrix to her huſband, and recovered a judgment againſt her for the 2000 *l.* upon the bond, of the goods of *Henry ſi tant' &c.* and that *Mary* by conſent of *Norwood* did leave in his hands 1000 *l.* of the goods of *Henry*, to ſatisfy the 1000 *l.* due to him But whether ſhe had waſted the 1000 *l.* or not, they pray the advice of the court. And they moreover found, that after the judgment to the plaintiff, other goods of *Henry*, to the value of 63 *l.* came to the hands of *Mary*, which ſhe paid upon debts of *Henry* due upon obligations; but whether ſhe had waſted the 63 *l. petunt etiam adviſament' Cur'*, And upon argument it was reſolved *per tot' Cur'*, That the defendant ſhall be charged of the goods of *Mary* for the 1000 *l.* left to her own uſe to ſatisfy her 1000 *l.* for by the confeſſion of the judgment to the plaintiff ſhe had made herſelf liable to it; for ſhe might have pleaded the obligation of 2000 *l.* in bar of the 1700 *l.* being due upon contract to the plaintiff, which not having done, ſhe ſhall be charged to pay it notwithſtanding the other judgment for her proper debt. As if an adminiſtrator hath aſſets to the value of 100 *l*; only, and confeſs two judgments to two ſeveral perſons for 100 *l.* a-piece, ſhe ſhall be obliged to pay both, as if ſhe had given to them two ſeveral

obligations to pay them. By *Pemberton*, *Windham* and *Charlton*, It not being found that at the time of the judgment confeſſed to the plaintiff, ſhe had notice of the obligations upon which ſhe paid 63 *l.* ſhe ſhall not be charged for the ſaid 63 *l.* neither ſhall it be a *Devaſtavit* in her; for they held, that an executor who paid debts upon contracts, where there are debts by ſpecialty not paid, whereof they had no notice, it ſhall not be a *Devaſtavit* by payment of the debts upon contracts, they not having notice of the ſpecialties; but *Levinz totis viribus contra*, in this point: He agreed, that if executors pay a debt of equal nature after writ brought for another debt of the ſame nature, they ſhall be excuſed if they have not notice of the writ; but they may not pay a debt of inferior nature after writ brought for a debt of ſuperior nature, have they notice of the writ or not. Nor was it at any time ſeen before, that want of notice of the ſpecialty ſhall excuſe payment of a debt upon contract. But by the other three judgment was given *ut ſupra.* But *Charlton* told *Levinz* afterwards, that he recanted his ſaid opinion in this point. 3 *Levinz* 113. *Britton* v. *Bathurſt.*

The act of the court ſufficient proof of adminiſtration.

In ejectment tried at the bar, where the plaintiff made title as adminiſtratrix, and proved her adminiſtration by the act of court, by the granting of it to her; and it was admitted ſufficient *per tout le court*, without ſhewing the grant of it under the ſeal of the court. 1 *Lev.* 101, *Peaſelie's caſe. Vide p.* 151. *ante.*

Upon

Upon an exception taken to a declaration, that it was not good, becauſe he declared as adminiſtrator upon letters granted *per Archidiaconum*, and did not ſay, *Loci illius Ordinar'*, nor *cui de jure* it belonged to grant it. The court held it good in caſe of the archdeacon, as well as in the caſe of the biſhop, for the archdeacon *eſt oculus epiſcopi*; and by *Twiſden* the declaration is good without ſaying, *Loci illius Ordinar'*, becauſe he produced his letters of adminiſtration. Otherwiſe in bar. 1 *Levinz.* 193. *Dring* v. *Reſpaſſe.*

Debt upon an obligation againſt an adminiſtrator, who pleaded *plene adminiſtravit*; upon which the plaintiff prayed judgment, according to *Shipley*'s caſe, 8 *Co.* and after brought a *Scire facias* upon aſſets which happened afterwards, and had judgment in *C. B.* upon which error was brought in *B. R.* and aſſigned in the firſt judgment that it ought not to have been given upon the plea of *plene adminiſtravit*, and for this *Dorcheſter* and *Web*'s caſe, 1 *Cro. Hutton* 128, *& Raſt. Entr.* 323, 329. were cited; but *e contra* were cited *Shipley*'s caſe, *& Trin.* 13 *Jac. Rot.* 1104. *& Mich.* 13 *Jac. Rot.* 206. both in this court. *Kelyng*, *Rainsford* and *Moreton* held, that the judgment ought to be affirmed according to *Shipley*'s caſe. *Twiſden dubitavit*, and took exception, becauſe the defendant was in *Miſericordia*, where the plaintiff was not delay'd, for the plea is a confeſſion of the action. *Cæteri:* It is not a direct confeſſion, but as an admittance of the debt, and it is after imparlance; and they affirmed the judgment. 1 *Levinz* 286. *Noell* v. *Nelſon.*

Scire

Scire facias Teſte 12 *Feb.* the laſt day of *Hil.* term, by the plaintiff as adminiſtrator againſt the defendant as terre-tenant, who imparled generally, and afterwards demanded *Oyer* of the letters of adminiſtration, which did bear *teſte* 26 of *March* after, between *Hill.* and *Eaſter* term in the time of vacation; upon which the defendant pleaded it in abatement. The plaintiff thereupon demurred, becauſe he might not plead in abatement after a general imparlance. But *per Cur'*, It appearing now upon the record, that the plaintiff had brought his action before the cauſe of action, the court *ex officio* ought to abate the writ; and ſo they did, although that he could not have *Scire facias* teſted after the 12th of *Feb.* till *term Paſch.* in this court; and although *in rei veritate* he might ſue after the adminiſtration granted in time of vacation. Otherwiſe it is where the ſuit is by original out of the chancery, where the court is always open. *tamen Quære* of this judgment; for it appeareth not truly upon the record when the adminiſtration bore *teſte*, that coming in after general imparlance. *Quære tamen*, for the *Oyer* might be after imparlance. 2 *Levinz* 197. *Harker* v. *Moreland.*

And now to what we have declared, to direct teſtators in the due and legal forming of their *wills* and teſtaments, and executors in the true and regular performing of them: and how men's eſtates are to be adminiſtred and diſpoſed of, when there is no *will* or teſtament made or declared by them; it remains only, that we declare what variety of caſes and ſuits have happened for want of the due and legal forming,

or

or true and regular performing of *wills* and teſtaments, and the reſolutions and judgments given thereupon, concerning the various kinds of

Deviſes and Legacies.

DEviſe, is where a man by his teſtament giveth lands, or tenements, or goods. And if the executor will not deliver goods to the deviſee, he hath no remedy by common law: but he muſt have a citation againſt the executors to appear before the ordinary, to ſhew cauſe why he performs not the *will* of the teſtator.

For the deviſee may not take the legacy, but it muſt be delivered to him by the executors.

If a man deviſeth, either by ſpecial name or generally, goods and chattels real or perſonal, and dieth; the deviſee cannot take them without the aſſent of the executors. But when a man is ſeiſed of lands in fee, and deviſeth the ſame in fee, in tail, for life or for years, the deviſee ſhall enter; for in that caſe the executors have no medling therewith. And the freehold or intereſt in law is in the deviſee before he doth enter, and nothing in that caſe, (having regard to the eſtate or intereſt deviſed,) deſcendeth to the heir. but if the heir enter, or hold the deviſee out, he may either enter or have his writ of *ex gravi Querela*. † *Coke's* 1 *Inſt.* 111. *a.*

Vide ante 222, & hic ante 11. & ante Wentw. p. 26.

† It ſeems this writ of *Ex gravi Querela* doth not lie without a ſpecial cuſtom, although by cuſtom the land be deviſeable F. N B. 459, 4° margine poſt 170. Now the Deviſee may enter and bring Ejectment, ſince the Stat. 32 & 34 H. 8.

A de-

A deviſe may create an inheritance by other words than a gift can, yet cannot a deviſe direct an inheritance to deſcend againſt the rule of law. And the ſtatute provideth, that *Voluntas Donatoris, &c. obſervetur. Coke's* 1. *Inſt.* 25. *a. poſt.* 174.

Where a deviſe to a man, and his heirs male, is a good eſtate tail. *Coke's* 1 *Inſt.* 27. *a. poſt* 172.

Where by a deviſe to a man, and his heirs male, the ſon of the daughter ſhall not inherit. *Coke's* 1 *Inſt.* 25. *a.*

See 8 Rep. 94. Manning's caſe. If a man by his *will* deviſe his lands to his executors for payment of debts, and until his debts be paid; in this caſe the executors have but a chattel and an uncertain intereſt in the land until his debts be paid; for if they ſhould have it for their lives, then by their death their eſtate ſhould ceaſe, and the debts unpaid; but being a chattel, it ſhall go to the executors of executors for the payment of his debts. But otherwiſe it is if a leaſe be made to a man untill one hundred pounds be paid; for there, becauſe the rents are uncertain, the leſſee hath an eſtate for life determinable upon payment of one hundred pounds. *Coke's* 1 *Inſt.* 42. *a.*

See 2 Wilſon 402. If *Ceſtuy que uſe* had deviſed that his wife ſhould ſell his land, and made her executrix, and died, and ſhe took another huſband, ſhe might ſell the land to her huſband; for ſhe did it *en auter droit*, and her huſband ſhould be in by the deviſor, *Ibid.* 112.

Stat. 32 & 34 *Hen.* do not take away the cuſtom to deviſe lands; for an affirmative act doth not take away cuſtom. 1 *Coke's Inſt.* 115.

Tenant

Tenant in dower may deviſe corn growing. *Coke's* 2 *Inſt.* 81.

If a man make a feoffment to the uſe of his *will*, or to the uſe of ſuch perſon or perſons, and of ſuch eſtate or eſtates, as he ſhall appoint by his will: By opperation of law the uſe doth veſt in the feoffor, and he hath the uſe in the mean time, and is ſeiſed of a qualified fee, till declaration be made according to his power, and then the eſtates take effect by force of the feoffment, and the uſe is directed by the *will*. But if ſuch feoffor by *will* deviſe the land itſelf, without reference to his authority, there it ſhall paſs by the *will*. *Coke's* 6 *Rep.* 18. *Sir Edward Clere's caſe*. *Hic ante p.* 15.

If a man deviſe lands to one, and his heirs, and afterwards the deviſee dieth before the deviſor, the deviſe is void. For the *will* was alterable at the pleaſure of the deviſor, and the heir cannot be a purchaſer. *Coke's* 1 *Rep.* 156. *Rector of Chedington's caſe*.

A deviſe imports a conſideration in itſelf, and therefore cannot be averred to be to the uſe of any but the deviſee, if it be not expreſſed in the *will*. No more can a deviſe be averred to be for a jointure, unleſs it be expreſſed in the *will*. *Coke's* 4 *Rep.* 4 *Vernon's caſe*.

The writ *ex gravi Qurela* lieth, where a man is ſeiſed of lands or tenements in any city or borough, or in gavelkind; which lands are deviſable by writ time out of mind. Now if ſuch lands be deviſed in fee-ſimple or fee-tail, he, to whom this deviſe is made, ſhall have this writ *ex gravi Querela*, for to execute that deviſe.

The

The remainder in fee to a ſtranger, if tenant in tail enter and die without iſſue, he in the remainder ſhall have this writ. And the heir of the diviſor for want of iſſue, or he who hath the reverſion, ſhall have this writ. *F. N. B.* 459. 4*to. Edit.*

A man deviſeth lands in *London* to his wife, upon condition, that if ſhe marrieth, the lands ſhall remain to his ſon in tail, and for want of ſuch iſſue, the remainder to the right heirs of the donor in tail. The wife taketh huſband, and ſhe and her huſband occupieth the lands, he in the remainder dieth without heirs of his body. The right heirs of the donor ſhall have a ſpecial writ of *Ex gravi Querela. Co.* 10 *Rep. Mary Portington's caſe*

By cuſtom of *London* a man may deviſe all his lands; but to his wife he can deviſe only for life.

The goods of a freeman cannot be deviſed: but the wife ſhall have one third-part, and the children another third-part, and the other third-part ſhall be diſtributed or diſpoſed of for the good of his ſoul; and this is called the death's part. *The City Law, pag.* 4 And may deviſe in mortmain.

Deviſee of lands may enter into them without livery of ſeiſin thereof to be made to him. *Co.* 1 *Inſt.* 112.

If a man by teſtament deviſe that his executors may ſell the tenements he hath in fee-ſimple, after his death the executors may ſell the tenements, and put out the heir; but in this caſe they muſt all join. But if a man deviſe lands to his executors to be ſold, and one of the executors dieth, the ſurvivor may ſell the land,

land becauſe as the eſtate ſo the truſt ſhall ſurvive. And what might be done by cuſtom in ſome particular places when *Littleton* wrote, may now be done generally by *Stat.* 32 & 34 *H.* 8. And if one executor refuſe to ſell, the others may ſell, but not to him that refuſeth. 1 *Inſt.* 113. *a.*

And it is better to give them an authority than an eſtate, unleſs the teſtator intend they ſhall have the mean profits till ſale. *Co.* 1 *Inſt.* 112, 236.

And here you may note a diverſity between a deviſe which may create or paſs an eſtate, that cannot by conveyance or act executed in life of deviſor. *Ibid* 42.

There is great difference between a feoffment of lands upon confidence, or to intent to perform his laſt will; and a feoffment to the uſe of ſuch perſon or perſons, and of ſuch eſtate and eſtates, as he ſhall appoint by his *will.* For in the firſt caſe the land paſſeth by the *will*, and not by the feoffment, *&c. Coke's* 1 *Inſt.*

Where lands are given to a man, and the heirs male of his body, upon condition that if he die without heir female of his body, that then the donor ſhall re-enter; this condition is utterly void; for he cannot have an heir female of his body ſo long as he hath an heir male. *Coke's* 1 *Inſt.* 164. *a.*

A deviſe to a man and his heirs male makes a good eſtate tail, 27. *a.* But the ſon of the daughter ſhall not inherit. *Hic ante* 169.

Lands are deviſable according to the cuſtom of ſeveral places, as in many places all, in ſome places only ſuch as the deviſor hath purchaſed.

In

In ſome places he may deviſe any eſtate: in ſome places for life only, *&c.* And *Voluntas Teſtatoris eſt ambulatoria uſque ad mortem.*

A woman cannot deviſe lands ſhe hath in fee to her huſband, becauſe ſhe is *Sub poteſtate Viri ſui*, and hath not power to deviſe the ſame; but a man may deviſe to his wife.

And it is truly ſaid, the firſt grant and the laſt *will* are of greateſt force.

This doctrine is exploded, and where the deviſe is to two, they ſhall be joint-tenants.

Where in one *will* are divers deviſes; the laſt ſhall ſtand, *Cum duo inter ſe pugnantia reperiuntur in Teſtamento ultimum ratum eſt.* *Coke's* 1 *Inſt.* 112, 113.

If a leaſe be deviſed to one and his heirs male of his body, yet his executors ſhall have it. For a term is but a chattel which cannot be intailed; and ſuch deviſee may well alien the term to whom he pleaſeth. *Coke's* 10 *Rep.* 87. *Leonard Lovie's caſe. Vide ante Wentw. p.* 54. *& poſt.* 174.

A man deviſed lands to one for his life, and after to his next heir male and to the heirs males of his body: agreed he hath but an eſtate for life, becauſe he had expreſs eſtate for life deviſed to him, and the remainder is limited to his next heir male in the ſingular number, and the right heir male of the deviſee cannot enter for the forfeiture in the life of the deviſee, for he cannot be heir as long as the deviſee liveth. And the deviſee by feoffment determining his eſtate for life by a condition in law annexed to the ſame, it cannot afterwards be revived, and therefore the contingent remainder was deſtroyed: but if tenant had been diſſeiſſed and died, it had been otherwiſe. *Co.* 1 *Rep.* 66. *Archer's caſe.*

A deviſe may create an eſtate otherwiſe than a gift can, yet cannot a deviſe, direct an inheritance againſt rules of law: and the heir in tail male muſt make his conveyance by males only, and the female in tail female by females only. Therefore the ſafeſt way, when a man will intail his lands to the heirs male and female of his body, is to limit the firſt eſtate to him and the heirs male of his body, the remainder to him and to the heirs of his body, and then all his iſſues whatſoever are inheritable. *Co.* 1 *Inſt.* 25. *b. Co.* 1 *Inſt.* 377. *a. Hic. ante* 169.

If a man deviſe by his laſt *will*, lands or tenements to a man and to his heirs male, this by conſtruction of law is an eſtate tail; the law ſupplying the words (of his body.)

A man poſſeſſed of a term for years, by his laſt *will* deviſed the ſame to one and the heirs of his body begotten, and made his executors and dies; the deviſee entereth by the aſſent of the executors, hath iſſue and aliens the term, and dieth; this alienation barreth the iſſue, for a term of years cannot be entailed. *Co.* 4 *Inſt.* 87.

That the firſt deviſee cannot bar an executory deviſe: and that requeſting and accepting a thing imply an aſſent, *Non enim refert an quis aſſenſum ſuum præbet verbis an rebus ipſis & factis. Co.* 10 *Rep.* 53. *Lampet's caſe.*

Such eſtate as cannot by the rules of common law be conveyed by act executed by a man in his life-time by advice of counſel: cannot be deviſed by the *will* of a man who is intended in law to be void of counſel. *Co.* 1 *Rep.* 85. *Corbet's caſe.*

See the ſtat. of mortmain, 9 Geo. 2. ch. 36.

And any man at this day may give lands, tenements or hereditaments, to any perſon or perſons, and their heirs, for finding of a preacher, maintenance of a ſchool, or any other charitable uſes. And it is good policy upon every ſuch feoffment or eſtate to reſerve a ſmall rent to the feoffor and his heirs, or to expreſs ſome ſuch conſideration of ſome ſmall ſum. For then, although the ſtatute make the uſe expreſſed void, yet the feoffees ſhall be ſeiſed to their own uſe, and not to the uſe of the feoffors as they ſhould be without conſideration. *Co.* 1 *Rep.* 24, 25. *Porter's caſe.*

In 38 *H.* 8. *Dyer* 61. *b. William Whorwood* ſeiſed of land to the value of three hundred and ſixty pounds, of which ſixty pounds was by joint-purchaſe to him and his wife during the coverture; deviſed, that his wife ſhould have a third-part of all his land during her life, with thoſe lands ſhe had in jointure; the aſſignment to be made by his executors, if it were not contrary to law. This widow refuſed her jointure of ſixty pounds, and demanded a third-part of the whole inheritance; *viz.* One hundred and twenty pounds as her legacy, and a third-part of that which remained for her dower, *viz.* Eighty pounds; at laſt it was by agreement ordered and decreed in the court of wards, that ſhe ſhould have the legacy *ut ſupra*, and forty pounds over for her dower. *The Woman's Lawyer* 185, 186.

The party had two ſons and two daughters, and deviſed by *will*, that if one died before 21, the other ſhould have her full part. Afterwards the defendant marrying, the ſurvivor was promiſed to have both portions, and made joint-

ture accordingly. The *will* is void in that point, becauſe by cuſtom the ſon ſhould have part. *Nicholas contra Dutton.* The like in *Bacon*'s caſe, *Tothill's Tranſactions.* 112. *Edit.* 1671.

Where a deviſe is void in law by miſrecital of a grant, and lack of an attornment; the court decreed it good. *Bacon*'s *caſe*, *Tothill.*

A deviſe without attornment good. *Co.* 1 *Inſt.* 111, 112. *a.* 322. *a.*

One joint-tenant promiſed the other upon his death-bed that he would not take advantage of the ſurvivorſhip, but ſuffer him to diſpoſe of it by his *will*, by which he deviſed part for the payment of his debts, and the ſurvivor was ordered to make the eſtate accordingly. *Cary's Rep.* 81. *Spring et ux'* v. *Upton.*

A deviſe to an heir on condition to ſell, void in law, yet good by way of truſt in equity. *Caſes in Chanc.* 177, 179.

A deviſe of all eſtates real and perſonal for payment of debts is a deviſe in fee. *Ibid.* 197.

A deviſe to two legatees equally; the deviſe is joint, and yet the intention prevents ſurvivorſhip, *Ibid.* 239. 1 Wilſon 341.

Portions deviſed out of lands payable at prefixt days, which the premiſſes will not do, amounts to a deviſe to ſell. *Ibid.* 129.

By the Stat. 32 *H.* 8. *cap.* 1. every one (except a woman covert, and infant under the age of one and twenty years, or a perſon *De non ſane Memorie*) may, by their laſt *will* and teſtament in writing, or other act lawfully executed in their life, give, diſpoſe, will or deviſe, all ſuch lands, tenements and hereditaments as

they are ſolely ſeiſed of in fee-ſimple, or as much as of right in them is, of all ſuch lands, tenements and hereditaments, as they are ſeiſed of in fee-ſimple in coparcenary, or in common, in fee-ſimple to any perſon or perſons (except to bodies politick and corporate.) And two-parts of three of all ſuch lands, tenements or other hereditaments, as they hold in knights ſervice. *See* 12 *Car.* 2. *cap.* 2. 32 *H.* 8. *c.* 1. *and* 34 *&* 35 *H.* 8. *cap.* 5. *Co.* 1 *Inſt. fol.* 111. *b. Swinb. part* 3. *ſect.* 3, 4. *and Wing. Abr. of Stat. Title Wills.*

All manner of goods and chattels, real and perſonal, moveable and immoveable, may be diviſed by *will* or teſtament, except in ſome certain caſes.

What cannot be deviſed.

As where two men are jointly poſſeſſed of goods and chattels, real or perſonal, one of them cannot make his *will*, and bequeath his part to another; for when he dies his part goes to the ſurvivor, and ſo it is in lands, tenements and hereditaments. *Cowel's Inſt.* 140.

Nor can a ſpiritual perſon, or maſter of a college, or hoſpital, or mayor of a city, deviſe thoſe things which belong to their church, college, hoſpital or city; nor can the crown or jewels of the realm be deviſed by *will*, but they may be given by letters patents; and a parſon by *will* may deviſe the corn growing on the glebe land at the time of his death. *F.N.B, Deviſe* 5.

The huſband cannot deviſe ſuch goods as his wife hath, as being executrix to another, nor ſuch things as are in action, as debts due to her before marriage by obligation or contract, unleſs

unleſs he and his wife ſue and recover the ſame during marriage, or that he renew the bonds, and take them in his own name; otherwiſe, after his death, they remain to her. *Co.* 1 *Inſt.* 351. *b.*

Alſo if the huſband be poſſeſſed of a term or leaſe for years, in right of his wife, he cannot deviſe it by his *will*, but he may grant it away or diſpoſe of it in his life-time; or if he make no diſpoſition thereof, yet if he ſurvive her, then it falls to him; and in ſuch caſe, he may deviſe it by *will*. *Ibid.*

An adminiſtrator cannot deviſe thoſe goods by *will* which he hath as adminiſtrator to another perſon dying inteſtate, but adminiſtration thereof ſhall be committed to the next of kin to the firſt inteſtate neither can an executor deviſe thoſe goods by way of legacy which he hath as executor; but he may make his teſtament, and appoint another executor, who ſhall have the adminiſtration of the ſame goods to the uſe of the firſt teſtator. *Swinb. part* 3. *ſect.* 6 *Bro. tit. Adminiſtrator. pl.* 7. *Fitz. eod. tit. pl.* 3.

If a woman tenant in dower ſow her land, and afterwards marry, and the huſband dies before ſeverance of the corn; in this caſe it remains to her, and he cannot deviſe it: but if it had been ſown after the marriage, he might have deviſed it. *Doctor & Student, Lib.* 1. *cap.* 20. *Co. Lit.* 55.

If the teſtator hath neither wife nor child at the time of his death, he may then diſpoſe and deviſe all the clear reſidue of his goods and chattels, over and above the diſcharging of his funeral expences, and his debts. *Swinb. part* 3. *ſect.* 16.

Vide 4 & 5 W. & M. cap. 2. & 2 Ann. cap. 5. which give privilege there to diſpoſe of their perſonal eſtates, as in other places.

But it is the cuſtom of many places, eſpecially within the province of *York*, that if the teſtator have a wife or child at the time of his death, that then he can but diſpoſe of half of ſuch his clear goods, and the other half is to go to the wife or child; and if he have both a wife, and child or children, at the time of his death, then the goods are divided into three parts; whereof one part is to the wife, another to the child or children, and the other third part, called the death's part, is left to his diſpoſing; and if no diſpoſition be made thereof, it falls to the executor. But not here, that if the child or children were heirs to the teſtator, or were advanced by the teſtator in his life-time, then the teſtator may deviſe one half of the clear goods, and the other half ſhall go to his wife. *F. N. B. Bre. de Rat. part bonorum.*

Note, where the wife and children ought to have a ratable part of the goods of the deceaſed, be it third part or half, as the caſe is, there alſo they ought to have a like part of the debts due by the deceaſed, after they are recovered by the executor or adminiſtrator; but of leaſes they can have no rateable part, where they uſe to have a rateable part of the moveable goods and debts recovered, unleſs it be by ſpecial cuſtom of the city, county, deanry, or place where the teſtator dwelt, and had ſuch leaſes. *Swinb. part 3. ſect.* 16.

This rateable part of the goods to the wife and children is ſaved to them by the ſtatute of *Magna Charta:* but note, the wife or children cannot ſue the executor or adminiſtrator for their rateable parts till all the teſtator's debts be paid, and

and then what remains is to be divided according to the rules aforeſaid, into two or three parts before any legacies be paid; for they muſt all be paid out of the death's part after the diviſion. *Mag. Ch. cap.* 18. *F. N. B.* 284. *4to Edit. b. Co.* 2 *Inſt. fo.* 33.

Legacies may be given divers ways, either ſimply or conditionally; *that* legacy is ſaid to be ſimple which is given without a condition annexed to it: and as in appointing an executor, it matters not after what form of words it be; ſo it is in the bequeathing of a legacy, for it ſignifies not after what form it be given; ſo that the teſtator's meaning do but appear, whether it be in goods and chattels, or lands and tenements. *Swinb. part* 4. *ſect.* 4. *num.* 18.

Note, That a legacy may be given from a certain time, or until a certain time, albeit the legatary die in the mean time, before the day come; yet the executors or adminiſtrators of the legatary may recover the ſame when once the day is paſt, as the legatary himſelf might have done if he had lived ſo long; unleſs the meaning of the teſtator be to the contrary, or that it be ſuch a thing as cannot be tranſmitted to the executor, as perſonal ſervice: but if the legacy be given after an uncertain time, as where the teſtator gives to *A. B.* one hundred pounds when his ſon ſhall die, or the like; there if *A. B.* die before the time come, there the executors or adminiſtrators of *A. B.* can then recover nothing. *Swinb. part* 4. *ſect.* 17.

Note, That a legatary may not of his own authority take the legacy and ſerve himſelf, but muſt receive the ſame at the hands of the

This may be good in the spiritual court, but is not law with us, vide ante 223.

executor; except in some cases, as where the legatory is possessed of his legacy at the time of the testator's death; for in such case he may retain and keep it, if there be sufficient assets besides in the executor's hand to pay the testator's debts; or if the testator give licence to the legatary to enter to his legacy, then he may do it, without the executors consent; and if he be both legatary and executor, then he may serve himself. *Swinb. part* 4. *sect.* 4. *num.* 23.

If the testator bequeath to *A. B.* all his goods; in this case it is the opinion of some, that *A. B.* shall have the testator's whole estate, actively and passively, (only his lands, tenements and freehold excepted) being in effect, his executor or heir, as the civil law terms him, and is hereby chargeable with the testator's debts so far as the goods will extend. *Swinb. part* 7. *sect.* 10.

But others are of opinion, that if a man grant *omnia bona*, (that is all his goods) in this case leases for years, nor a ward, nor things in action, as debts upon promise or obligation, shall not pass thereby, for these are chattels. *Kitch.*

But if the testator do bequeath to *A. B.* all his chattels, in such case he shall have the testator's whole estate, leases and wards too; for *Catalla* includes all but freehold as well immoveable as moveable. *Swinb. part* 7. *sect.* 10.

Vide ante Wentw. p. 57. to 63.

But note, that *A. B.* by such divise shall not have glass of the windows, wainscot, tables dormant, fats in the brewhouse fixed to the freehold, nor furnaces, nor the box or chest wherein the testator's evidences are; nor hawks, nor hounds,

hounds, nor doves in the dovehouſe, nor fiſhes in the pond, nor deer in the park; for theſe things belong all to the heir. *Kitch.*

Note alſo, that if *A. B.* die before he have proved the deceaſed's *will*, wherein he bequeaths to him all his goods, or all his chattels as aforeſaid, yet in ſuch caſe adminiſtration ſhall be committed to the next of kin to the ſaid *A. B.* and not to the next of kin to the teſtator. *Swinb. part* 4. *ſect.* 10.

But if the teſtator in either of the caſes make another man executor, then the legatory ſhall not enter into the whole eſtate of the deceaſed; but the executor proving the *will* is to enter, and may receive or ſue for all the debts due to the teſtator, and ſtands alſo chargeable with the payment of the debts, and what remains is due to the univerſal legatary. *Swinb. part* 7. *ſect.* 10.

If the teſtator bequeath to *A. B.* all his moveable goods; here the legatary may recover all the teſtator's perſonal goods and cattle, both quick and dead, which either move themſelves (as horſes, ſheep, oxen, ſwine, *&c.* or can be moved by another, as houſehold-ſtuff, plate, plough-geer, wains, carts, corn in the barns or garner, and alſo corn growing on the ground. And ſuch debts as were due to the teſtator, and did ariſe by reaſon of ſuch moveable things, and for recovery whereof there lieth an action perſonal, do alſo belong to the legatary; but the legatary cannot ſue for the ſame in his own name, if another man be made executor; but the executor muſt ſue for the ſame, and after re-

recovery, deliver the ſame to the legatary. *Swinb. part* 7. *ſect.* 10.

What things paſs, or not, by the bequeſt of all his houſehold ſtuff.

If the teſtator bequeath to one all his houſehold ſtuff: in this caſe he ſhall have all the tables, forms, ſtools, chairs, trunks, cheſts, cupboards, bedſteads, curtains, vallance, rugs, blankets, and all manner of bedding; and alſo hangings, carpets, and all manner of linen, as ſheets, table-cloths, *&c.* baſons and ewers, candleſticks, ſalts, flaggons, pottingers, ſawcers, *&c.* bowls, barrels, and all manner of veſſels ſerving for meat or drink, whether they be of earth, wood, glaſs, pewter, braſs, or ſilver, or gold, if they were uſed in the daily ſervice of the houſe, and not kept for ornament only, and alſo pots, pans, ſpits, racks, and the like; and laſtly, coaches by ſome are held to paſs by the name of houſehold-ſtuff. *Ibid.*

But apparel, books, weapons, artificers tools, cattle, victuals, corn in the barn or granary, wains, carts, ploughs, *&c.* and veſſels affixed to the freehold, do not paſs by the name of houſehold-ſtuff. *Ibid.* but Quære as to ſome of theſe things fixed, which at this time will paſs by the name of *houſehold-ſtuff* as coppers grates, *&c.*

If the teſtator having ſtore of young colts, willeth his executor to give to *A. B.* two colts of the age of two years, and after the making of his *will* liveth many years; in this caſe there is due to the legatary two of the firſt colts, which were extant at the time of the *will* making, and not of the laſt colts at the time of his death. *Ibid. ſect.* 11.

If the teſtator bequeath to *A. B.* all his goods which are in ſuch a place, and afterwards he brings

brings more goods thither, and then dies; here the legatary ſhall have only thoſe goods which where there when the *will* was made, and not thoſe goods too which were brought thither afterward. *Ibid.*

But if the teſtator had ſaid I bequeath to *A. B.* all my goods which ſhall be in ſuch a place, or all my goods which may or can be found in ſuch place; here all the goods in that place, at the time of the teſtator's death, are due to the legatary, though they were brought thither by the teſtator after the making of his *will.* *Ibid.* 11.

If the teſtator bequeath to *A.* his herd of cattle, and there is but one left at the time of his deceaſe, the legatary can recover no more. *Ibid.*

If the teſtator bequeath to a child in the mother's womb one hundred pounds; in this caſe, if the mother bring forth two or three children at that time, the legacy is to be divided amongſt them. *Swinb. part* 4. *ſect.* 20.

But if the teſtator ſay, if my wife bring forth any child, I give to the ſame one hundred pounds. Here if ſhe bring forth two or three children at that time, then every child ſhall have one hundred pounds, if the teſtator's goods do ſuffice to ſatisfy the ſame: unleſs it be ſufficiently proved that it was the teſtator's meaning, that they ſhould have no more but one hundred pounds among them. *Ibid.*

Where the teſtator doth bequeath ten pounds to *A. B.* remaining in ſuch a cheſt, and at his death only five pounds is found in the ſame cheſt. In this caſe the legacy is good for only the

the five pounds found in the cheſt, and no more. *Swinb. part 7. ſect. 15. num. 15.*

If the teſtator do imagine himſelf to be indebted to another perſon, and doth bequeath that debt to the ſame perſon, which he erroneouſly ſuppoſeth he oweth him, not expreſſing any ſum, in this caſe the legacy is void; but if he ſay, I do bequeath ten pounds to ſuch a perſon which I owe him, whereas the teſtator knows he owes him nothing, yet in this caſe the legacy is due, notwithſtanding the falſe demonſtration; and here the teſtator is not preſumed to err, unleſs the executor make proof of error. *Ibid. num.* 14.

If the teſtator bequeath one hundred pounds to the church, not mentioning what church, it ſhall then be underſtood of his pariſh church; or if he name a church, and there be divers there of the ſame name, and none of them his pariſh-church; then the executor if he prove the *will*, or the ordinary if he refuſeth, may beſtow the ſame on which church he will; but if the teſtator's pariſh-church be of the ſame name, it ought then to be beſtowed there. *Swinb. part 7. ſect.* 8.

Where the teſtator doth bequeath one half of his goods to one perſon, and makes another his executor, willing and appointing that all his goods ſhall be divided betwixt them; in this caſe the legatary ſhall have half before debts paid, and the executor the remainder after debts paid: As where the teſtator hath goods to the value of one hundred pounds, and oweth twenty pounds out of the ſame; here the legatary ſhall have fifty pounds, and the executor ſhall

pay

pay the twenty pounds debt out of his half. *Cowel's Inſt. p.* 146.

If a man bequeath twenty pounds to *A.* and twenty pounds to *B.* and twenty pounds to *C.* and makes his executor and dies, having goods but to the value of twenty pounds in all, of which goods the executor makes an inventory; in this caſe he may pay which of the three he pleaſes his whole legacy, and the other two are without remedy; or he may, if he pleaſe, pay every one of them a ratable part; and if in caſe the executor make no inventory, yet he is chargeable no further than the value of the goods; and ſo if every legatary in ſuch caſe ſhould ſue him, they muſt prove ſufficiency of goods, or otherwiſe they ſhould get nothing. *Dr. & Stud. lib.* 2. *cap.* 10.

Vide poſt p. 193. that he cannot pay one legatee the whole, tho' his legacy is become due, and the reſt not.

If the teſtator ſay, I will that *A. B.* ſhall have an horſe; here the election belongs to the legatary: but if he had ſaid, I will that my executor give to *A. B.* an horſe, then the election belongs to the executor; and if the words of election be directed to neither of them, then the legatary ſhall make the election, if there be any ſuch thing extant amongſt the teſtator's goods as is bequeathed; and if not, then the executor is to make the election; and in caſe where the legatary chuſeth, he muſt not take the very beſt, unleſs there be no more but two of the things extant; for ſo he may do when the teſtator grants him the election, and as the legatary may not chuſe the beſt, neither may the executor obtrude the worſt of thoſe things extant; and where there is no ſuch thing extant, then the

the executor is to provide a competent thing for the legatary.

If the teſtator bequeath two horſes to two men, having no more, and one of them is a great deal better than the other; in this caſe, he that is firſt named in the teſtament ſhall have the election.

If the teſtator give to *A. B.* twenty pounds if he will; in ſuch caſe *A. B.* muſt expreſs his willingneſs to accept thereof by ſome means, or elſe the legacy is not due; and if he die before ſuch expreſſion, then the legacy is loſt, and ſhall not go to his executors or adminiſtrators, which otherwiſe it would, if no ſuch condition had been expreſſed. *Swinb. part* 4. *ſect.* 6. *num.* 7.

If an executor have a legacy left him by his teſtator, and refuſeth to ſtand to the executorſhip, in ſuch a caſe he loſeth his legacy. *Swinb. part.* 6. *ſect.* 2.

But if the executor be not duly admoniſhed to take the executorſhip upon him; then if he be the teſtator's kinſman, or ſuch a perſon to whom the teſtator would have given the legacy though he did not perform the *will*, and take the office upon him; in ſuch caſe he ſhall not loſe the legacy by the refuſal of the executorſhip, neither ſhall the wife loſe her thirds, nor the children their filial portions, nor the creditors their debts, if any of them be made executors, and refuſe to take the office upon them. *Swinb. part* 6. *ſect.* 3. *num.* 15.

See more before in the particular treatiſe concerning executors.

If

If a legacy be bequeathed to a city orphan in any part of *England*, the executor may be compelled to give ſecurity (for payment of it) to the court of orphans. 1 *Vent.* 180. 23 & 24 Car. 2. B. R. in Harwood's caſe.

A. deviſeth land to *B.* for life, paying yearly to *C.* during the life of *B.* 6 *l.* rent at *Michaelmas*, and if unpaid, that *C.* might diſtrain for it: It ſeemed that this word *Paying*, in this caſe, is not a condition for breach whereof *B.* ſhould forfeit his eſtate, becauſe a diſtreſs for the rent is given by the *will* to *C.* 1 *Rolls. Abr.* 411. *I. pl.* 3.

The wife may not be ſuffered, though to good uſes, to diſpoſe of any money ſhe hath raiſed out of her huſband's eſtate by frugality. But otherwiſe it is of monies raiſed out of a ſeparate maintenance. *Caſes in chancery* 117, 118. *Dame Marg. Pridgeon* againſt *the executor of her huſband.*

Lands deviſed for the payment of debts and legacies, the perſonal eſtate ſhall be firſt applied; for the implied intent muſt not without clear expreſſion alter the equitable general law. *Caſes in chanc.* 297 *Lord Grey* againſt *Lady Grey.*

Legacy not attachable by foreign attachment. *Caſes in chanc.* 257. *Chamberlain* againſt *Chamberlain and others*

A citizen of *London* cannot deviſe his child's part over to another, in caſe his child die in his minority. *Caſes in chanc.* 199. *Pate* againſt *Hatton.*

A conveyance for years is not a revocation of a deviſe in fee, but *pro tanto* only. *Caſes in chanc.* 193. *Barber* againſt *Took.*

Lands contracted for by a purchaſor paſs by a deviſe of the purchaſor. *Caſes in chan.* 39. 2 Chan. Ca. 144. 3 Salk 85.

A deviſe of the profits till a child come to 21 years of age, is a good deviſe of a term till the child would be 21, though he died before. *Caſes in chan.* 114. *Creditors of Church againſt Church.* 3 *Co.* 20. *b. Boraſton's caſe, S. P.*

If the feoffment made be to the uſe of his laſt will, although he deviſeth land with reference to the feoffment, yet it taketh effect only by the *will.*

2 Wilſon 254, 255. A man cannot during his life convey an eſtate to his wife in poſſeſſion, reverſion or remainder: but he may by deed covenant with other to ſtand ſeiſed to the uſe of his wife, or make a feoffment, or other conveyance to the uſe of his wife: and now the eſtate is executed to ſuch uſes by the Stat. 27 *H.* 8.

See 2 Stra. 1253. All deviſes of land void, except in writing with three or four witneſſes. †

And no revocation of ſuch *will*, unleſs in writing or burning, or cancelling by the teſtator, or by his conſent. *Stat.* 29 *Car.* 2 *Wing. Abr. Frauds* 17, 18.

A termer of a houſe for 40 years deviſed the ſame by his teſtament without limitation of the eſtate which he gave: it ſhall paſs the whole term, for the deviſee may not have an eſtate in the meſſuage at will, nor for term of life, nor any term for years or a year. Therefore the entire term ſhall paſs *per opinionem Juſticiariorum de Banco. Dyer* 307. *Pl.* 69.

W. ſeiſed in fee of a meſſuage in *London*, by his teſtament in writing deviſed it by theſe

† See 25 Geo. 2. c. 6. whereby creditors and legatees are made competent witneſſes to wills.

words:

words: *Item*, I give the fee-ſimple of my bigger houſe in *Soper-lane* to my couſin *A. L.* and after her deceaſe to *W. L.* her ſon (which *W.* was her heir-apparent) and died. *A.* entered and took huſband, and had iſſue by him, and died. If the huſband ſhould be tenant by the curteſy. Upon a ſpecial verdict *in ejectione firmæ* the opinion of the court was, that the feme had an eſtate but for term of life, the remainder to *W.* her ſon for his life, and the fee-ſimple to the feme; ſo the huſband ſhould not be tenant by the curteſy. *Et ſic adjudicatur. Dyer* 357. *Pl.* 44.

When the intent of a man expreſſed in his teſtament doth not agree with the law, the intent ſhall be taken as void. As if a man deviſe land to *H.* in fee, and if he die without heir, that *M.* ſhall have the land; this deviſe to *M.* is void, for a fee-ſimple cannot depend upon a fee-ſimple. *Dyer* 4. *Sect.* 10.

If a man will that his feoffees ſhall make an eſtate in tail to *A.* It is a good deviſe according to the intention of the deviſor. *Dyer.*

Infants within age may not make a deviſe, nor women covert may not deviſe their tenements by licence of their huſbands, nor in other manner during the coverture. Vide 34 H. 8.

Where a man hath deviſed by his teſtament enrolled, a certain rent to ariſe out of his tenement within the city of *London* without clauſe of diſtreſs; yet, by uſage of the ſaid city, he to whom the deviſe is made may diſtrain, and avow the taking, if the rent be behind. And in the ſame manner ſhall be done of all the ancient rents called quit-rents within the ſame city.

A termor deviſed his term to one whom he made alſo his executor; the deviſee entered before any probate of the teſtament, and occupied the land a year and more without any probate and died. *Quer'*, If his executor (if he made any), or if his adminiſtrator if he died inteſtate, ſhould have the term or not, or that the ordinary ſhould commit the adminiſtration as of the firſt teſtator; and it was ruled there that the property of the term was in the executor by his entry, and executing of the deviſe without any probate. *Dyer* 367. *Pl.* 39.

By the cuſtom of *London*, a foreigner as well as a citizen freeman may deviſe his tenements in *London*, which he hath in ſimple-fee to another in fee: but ſuch deviſe may not be made in mortmain, unleſs by a citizen or freeman of the city. *Dyer* 255. *Pl.* 3.

Brown contra, becauſe the *will* comprehends all the hamlets.

A man ſeiſed of lands in fee in one town, and in two hamlets of the ſame town, and by his laſt *will* deviſed all his lands being in the town, and in one of the two hamlets by name, and died. And the opinion of divers juſtices was, that nothing in the other hamlet ſhould paſs. *Dyer* 261. *Pl.* 27.

A man ſeiſed of lands in fee made his executors *A.* and *B.* and by his laſt *will* would, that his executors ſhould have and hold the iſſues and profits of two parts of his lands, till his heir by the common law came to the age of 21 years, to the intent, that with the profits thereof, they ſhould pay his debts, and perform his legacies, and for the education of his children. One executor died, the ſurvivor made his executor and died, the heir being yet within age. The queſtion

was

was, if the executor of the ſurvivor might meddle with the profits of the lands, and with the diſpoſition thereof during the nonage. And it ſeemed he well might; for it was an intereſt in the executors by the deviſe, and not an authority or confidence only. *Dyer* 210. *Pl.* 24.

A man deviſed lands to be ſold by his executors, the money raiſed thereby to be diſpoſed in legacies particularly expreſſed in his *will*, and one of the legataries after the probate of the teſtament ſued in court chriſtian for the legacy. If prohibition did lye in this caſe was the queſtion; and as it ſeemed to the judges it did not lie, for that the money was aſſets in the hands of the executors, and no remedy for the legacy in the temporal court. *Dyer* 264. *Pl.* 41.

Coke took a good difference in *Nelſon* and *Sharp*'s caſe, *Cr. Eliz.* 466. when a bond is for the payment of a leſſer ſum at a day to come, it ſhall be a good plea againſt the legatee before the day (if he ſues for a legacy) for it is a duty preſently by the condition; otherwiſe, where a ſtatute or obligation is for the performance of covenants, or to do a collateral thing, there until it be forfeited, it is not any plea againſt a legatee, for peradventure it ſhall never be forfeited, and may lie *in perpetuum*, and by ſuch means no *will* ſhould be performed; but in ſuch caſe, the executor ſhall make a conditional delivery of the legacy, (*ſcil.*) if the obligation be recovered, then the legatee to redeliver the legacy. *Rolls Abr.* 928. *S. C.*

Pynes's caſe was cited by the lord chancellor, wherein it was reſolved, that where one had ſecured portions for his children of 100 *l.* Cited in Trin. 23 Ca. 2.

a-piece, and after by his *will* deviſed to each of them 100 *l.* as a legacy: that this would not double their portions, unleſs it be plainly proved that he intended ſo to do. 2 *Ven.* 348.

One diviſeth to *J. S.* all his goods, chattels and houſhould ſtuff, and there was 407 *l.* in ready money in the houſe, and he had deviſed to *A.* 1200 *l.* by the ſaid *will*. The court declared, that as to the 407 *l.* though the words were general, yet conſidering the intention of the teſtator, who by his ſaid *will* had given to her a legacy of 1200 *l.* if he had intended to have given her 407 *l.* more, he might in the ſame place of his *will* have given her 1600 *l.* And decreed, that the 407 *l.* ſhould come into account of the perſonal eſtate. *Chanc. Rep.* 190.

Several legacies are given, the firſt is due, the other is not due till afterwards, the executor may not pay the firſt whole legacy to the firſt, if there be not aſſets to pay the reſt.

In *Grove* and *Benſon*'s caſe, legatees were decreed to abate in proportion, where there was not enough to pay all debts, though one of the legatees have a ſtatute and a mortgage for his ſecurity of the legacy, and his legacy continued no longer a legacy; yet his legacy not being paid, he was decreed to abate in proportion. 21 *Car.* 2.

Legacy of 125 *l.* was given to the plaintiff to be paid at ten years of age, and at that age it was paid to the father, who after died inſolvent; the infant at full age ſued the executors of the deviſor for the 125 *l.* The lord keeper held

Halloway and Collins, 1 Chan. Ca. 245. But ſince that caſe the matter is well ſettled, and payment to parents diſallowed, as in the caſe of Doyley & Tolferry, 1715 Mich. Eq. Abr. 300. pl. 2, 58. pl. 6. Vern. 261. Gilb. Eq. Rep. 103. Will. Rep. 285. Gilb. Chancery, 331.

held it good payment. But it appeared that the executor took bond to ſave him harmleſs, and then he took the ſecurity at his own peril, and therefore decreed the executor to pay it. *Halloway's caſe*, 26 & 27 *Car.* 2.

A. by his *will* gives 800 *l.* to *C.* to be paid by his executor when *C.* ſhall attain to the age of 21 years. The infant by his guardian exhibits his bill to have the legacy ſecured; and it was decreed accordingly.

Legacies may be recovered in the ſpiritual court againſt an adminiſtrator, with the *will* annexed, or againſt an executor of his own wrong, as well as againſt an executor by right. *Rolls* 919. †

A man ſeiſed in fee deviſed the land to his eldeſt ſon *Thomas* for life, and if he died without iſſue living at the time of his death, to *Leonard* another ſon and his heirs, but if *Thomas* had iſſue living at the time of his death, then the fee ſhould remain to the right heirs of *Thomas* for ever. *Thomas* entered after the death of the deviſor, and ſuffered a common recovery (under which the defendant claimed) and died without iſſue, whereupon *Leonard* entered, and made the leaſe to the plaintiff; and this caſe was argued at the bar twice, and two queſtions were put; Firſt, if *Thomas* had by the *will* only an eſtate for life by the deviſe, with a contingent remainder to *Leonard*, or that the fee was veſted in *Thomas* with an executory deviſe to *Leonard*. Secondly, if it be an executory de-

† An executor is a truſtee for a legatee with reſpect to the legacy; and this is the only reaſon, why the legatee may bring his bill in equity againſt the executor for a legacy, ſuppoſing it to be a truſt. Will. Rep.

viſe to *Leonard*, whether the common recovery did bar it; and after divers arguments it was reſolved by the whole court, that *Thomas* did take only an eſtate for life by the *will*, the remainder to his heirs not executed; and although that he be heir to whom the reverſion ſhould deſcend, it ſhall not drown the eſtate for life contrary to the expreſs deviſe and intent of the *will*, but ſhould leave an opening, as they termed it, for the interpoſition of the remainders, when they ſhould happen to interpoſe between the eſtate for life and the fee; and they compared it to *Archer*'s caſe, *Co.* 1 *Rep.* where although that *Robert* the deviſee for life was heir, yet the remainder to his next heir male was contingent, and not an eſtate for life to drown by the deſcent of the reverſion; and ſo the eſtate of *Thomas* here being no other than an eſtate for life by the deviſe, the remainder to *Leonard* was a contingent remainder and barred by the recovery; and then the ſecond point will not come in queſtion, whether an executory deviſe ſhall be barred by the recovery. But upon the firſt point they all gave judgment for the defendant. 1 *Lev.* 11. *Plunket* v. *Holmes.*

In ejectment in the Common Pleas, and upon ſpecial verdict, the caſe was, That *Ramſey*, an alien *Scot*, before the union had iſſue four ſons, *ſcil. Robert*, *Nicholas*, *John* and *George*. *Robert* had iſſue three daughters yet living, *Nicholas* had alſo two ſons, *Patrick* and *William* yet in life, *John* had no iſſue, *George* had iſſue the leſſor. *John* being ſeiſed of the lands in queſtion, deviſed them to the heir of *Nicholas* and his heirs, *John* and *Robert* being before naturalized by

by act of parliament, with words, That they ſhould inherit to any anceſtor, lineal or collateral, as fully to all intents and purpoſes as if they had been natural ſubjects born in *England*. *John* and his wife are dead, and alſo *George*; *Patrick* the eldeſt ſon of *Nicholas* entered as heir of *Nicholas*, claiming by the deviſe, againſt whom the leſſor brought an ejectment as ſon and heir of *George*, and brother and heir of *John*; and this caſe being argued in the Common Bench two points were made: Firſt, if the deviſe to the heir of *Nicholas* was good; and reſolved by *Bridgman* and the whole court, that the deviſe was void. 1. Becauſe that *Nicholas* was in life. *Et nemo eſt Hæris viventis.* 2. *Nicholas* being an alien, might not have any heir by our law; heir he might have in *Scotland* not in *England*, where the lands are which the deviſe concerned. But then the queſtion was, ſecondly, if the plaintiff had any title, or if the lands ſhould eſcheat; and upon *that* the queſtion was, if *John* and *George* being aliens, ſons of an alien might be heirs, or inherit the one to the other, by the act of parliament, being naturalized as before. And after many arguments in the exchequer chamber, it was adjudged, that the one brother ſhould inherit the other by virtue of the ſaid act of parliament.

And it was agreed, That where a man had two ſons, and after is attainted, that the ſons ſhall inherit the one to the other, becauſe they had inheritable blood derived from their father and mother before the attainder, which could not be taken away by the attainder afterwards. And for this reaſon each of them might inherit

to their mother the lands which came by her; but if the attainder had been before the birth of the ſons it had been otherwiſe. 1 *Lev.* 59. *Collingwood v. Pace.*

1 Vent 413.

In ejectment and ſpecial verdict, where a man ſeiſed of lands in *Newcaſtle upon Tyne*, where the lands are deviſable by parol by the cuſtom: by a parol *will* a deviſe was in theſe words, *I give all to my mother, all to my mother.* And if the lands ſhould paſs by theſe words was the queſtion. It was argued by *Glyn* the king's ſerjeant for the plaintiff, who ſaid, that *All* was incertain whether intended lands or goods; and by *Jones* for the defendant, who ſaid, *Qui omne dat nil excipit*, and cited a caſe where by the deviſe of all his eſtate, all the eſtate as well real as perſonal did paſs, and *Benlow* 6. Deviſe of all his livelihood extended to land and goods. But *per Cur' All* is uncertain, and not ſufficient to diſinherit an heir, and gave judgment for the defendant that the lands did not paſs by the *will.* 1 *Lev.* 130. *Boman* v. *Milbank.*

In ejectment and upon *Non cul.* a ſpecial verdict. A man ſeiſed of a cloſe upon part of which was a houſe, and upon another part of it a kiln, and alſo of two mills adjoining to the cloſe, and uſed them all together till the year 1655. then he divided and ſold the houſe and a part of the cloſe, and reſerved the other part and the kiln, and uſed them with the mill (and in truth the kiln was a kiln for drying of oates, and the mills were for making of oatmeal, but it was not found by the verdict) and afterwards he ſold the mills with the appurtenances to the plain-

plaintiff; and if the kiln, and the parts of the cloſe on which it ſtood, paſſed for the defendant was the queſtion; and held clearly by the court that they did not paſs. 1 *Lev.* 131. *Archer* v. *Bennet.*

A baron and feme were ſeiſed of a copyhold to them, and the heirs of the baron; the baron ſurrendered to the uſe of his *will*, and deviſed them to the heirs of the body of the feme, if they ſhould attain to the age of fourteen years, and died without iſſue: the feme took a ſecond baron by whom ſhe had iſſue, but before the iſſue attained to the age of fourteen, the feme and the ſecond baron ſuffered a recovery in the court of the manor; and if the heir of the feme ſhould have the land, (the feme being dead) or not was the queſtion. Argued at the bar ſeveral times, and divers points were moved and argued; 1. If this deviſe were in any wiſe good being to a perſon not *in eſſe*. 2. If it might be good in reſpect of a double contingent, or a poſſibility upon a poſſibility, *ſcil.* of the feme having any heir of her body at all, and if ſhe had heir of her body, if it ſhould be of the age of fourteen at the time of her death. 3. If the deviſe ſhould be good, what eſtate ſhould it be, *ſcil*, a remainder or an executory deviſe. 4. If it ſhould be barred by the recovery; and the judges delivered their opinions. As to the firſt point. that a deviſe to an infant *in ventre ſa mere* is good, and that a deviſe to an infant *in ventre ſa mere* when he ſhall be born is all one; and they held the deviſe good notwithſtanding the double contingency; and as to the third point they

they all agreed, that if this deviſe ſhall be good, it ſhall be by way of executory deviſe, which may well be allowed to take place within the compaſs of a life, but not after one dying without iſſue, for that would make a perpetuity; and it ſhall not be by way of remainder, for although that the feme had an eſtate for her life, yet this is a new deviſe to take place after her death, and not as a remainder joined to her eſtate: as to the fourth, if it ſhall be an executory deviſe, they all agreed, that it ſhall not be barred by the recovery at common law, according to *Pell* and *Brown*'s caſe, 2 *Cro.* 590. *a Fortiori*, in this caſe of a copyhold, the recovery is no bar without cuſtom, and no cuſtom is found to bar eſtates by common recovery; but the court being divided in the principal point, no judgment was given, but the cauſe was agreed to be adjourned into the exchequer chamber. 1 *Lev.* 135. *Snow* v. *Cutler*.

Ejectment and ſpecial verdict; *Robert Keepe* ſeiſed of *Spains-hall* ſettled part of it upon his daughter for life, and afterwards by *will* deviſed the houſe to his wife for one year after his death, and then deviſed all his lands not ſettled or deviſed to *Thomas Keepe*, to hold to him and his heirs after one year after his death, and after the death of his daughter, and died, the year after his death was expired, and the daughter is yet in life, and ſhe brought the ejectment for the houſe, and if it did lie during the life of the daughter was the queſtion, argued at the bar only; for it was admitted that though the deviſe was of land not deviſed or ſettled, and not of the eſtate not deviſed or ſettled, yet the

the reverſion would paſs by the deviſe of the land, although that the land was the ſame ſettled and deviſed before, and ſhould take the reſidue of the eſtate in the lands; and it was reſolved, that the eſtate of the houſe paſſed immediately after the year after his death was expired, and ſhould not ſtay till both parts of the copulative were ended, that is to ſay, till after the year, and after the death of the daughter, but ſhould be taken diſtributively; *ſcil.* That the houſe ſhould paſs immediately after the year expired, and the reſidue after the death of the daughter; and *Gilbert* v. *Wittie's caſe*, 2 *Cro.* 655. 3 *Cro.* 199. *Co.* 5 *Rep. Wyndham*'s caſe were cited, 1 *Lev.* 212. *Coke* v. *Gerrard.*

It was moved to have writings brought in by the defendant to have a ſpecial verdict at the aſſizes drawn up, where the caſe would be, that a man deviſed his lands to his executors to be ſold for payment of his debts, and the lands being ſold, if the money in their hands muſt be aſſets at common law to charge them in debt: the writings were ruled to be brought in, and *Twiſden* juſtice ſaid, that he had known it to be adjudged that they were aſſets at common law without going to chancery. 1 *Lev.* 224. *Dethicke* v. *Caravan.*

Upon information that *Stephen Newman* ſeiſed of lands deviſed them to Trinity-college in *Cambridge* for the maintenance of a ſcholar there, and in the *will* was this clauſe; that if any by cavil ſhall hinder this deviſe, or that the ſame cannot go to the college by reaſon of the ſtatute of mortmain, then I deviſe them to *Robert Newman*

Newman and his heirs, and under this pretence, that by the ſtatute of mortmain the college could not have them. *Robert Newman* entred, and held the poſſeſſion of lands, whereupon the attorney-general brought this information for to have the lands eſtabliſhed with the college. And all this appearing upon the bill and anſwer, and it being a charity, it was held by the lord keeper *Bridgman*, that it ought to be eſtabliſhed with the college by virtue of the ſtatute of 43 *Eliz.* notwithſtanding the ſtatute of mortmain, and notwithſtanding the clauſe in the *will*; and ſo it was decreed. And the lord keeper ſaid, that it did not differ from *Lloyd*'s caſe. *Hob.* 136. 1 *Lev.* 284. *Dominus Rex* verſus *Newman in Cancellaria.*

Mich. 15 Car. 2. Garfoot & Garfoot, 1 Ch. Ca. 35. Trin. 27. Car. 2. Fowle & Green, 1 Chan. Ca. 262 Paſ. 1689. Roll. & Roll. 2 Vern. 99.

A man deviſed lands to his wife for her life, and that after her death the reverſion ſhould be ſold, and the money diſtributed between the heir and three nephews; the heir refuſed to ſell or to join with the wife in the ſame. And upon a bill exhibited in chancery againſt him to compel him to join in the ſame, the bill was diſmiſſed by the lord keeper *Bridgman*, who held the *will* void as to the ſale of the reverſion, it not being ſaid who ſhould ſell; but, in the houſe of peers, they, upon advice with the judges, reverſed the diſmiſſion, and decreed that the heir ſhould ſell; for when no perſon is appointed to ſell, it ſhall be intended that he ſhall ſell who hath the eſtate, that is the heir. *Vide* 5 *H.* 7. 12 *B. per Hide, Fenwick & Finneux.* A deviſe that lands ſhall be ſold, and not ſaid by whom, ſhall be ſold by the executors. The like intent when they are to be ſold for payment of debts. 1 *Lev.* 304. *Pits* v. *Pelham.*

In

In ejectment and ſpecial verdict, the earl of *Newport* being ſeiſed, and having three ſons living and two daughters, one of which daughters had iſſue, the wife of the defendant, deviſed the meſſuage called *Newport* houſe to the wife of the defendant in tail: provided, that if ſhe marry without the aſſent of the earl of *Mancheſter* and others, or died without iſſue, then to the leſſor of the plaintiff being then and yet an infant; ſhe having no notice of the condition, and being of the age of fourteen years married without the aſſent of the earl of *Mancheſter*, *&c.* with the defendant *Fry*: he entered, and the leſſor brought the ejectment, and the caſe was argued by counſel. 1. Whether this was a condition, or a conditional limitation; for if it be a condition the plaintiff is not heir, and ſo hath no right of entry, otherwiſe it is if it be a limitation. 2. Be it the one or the other, yet notice of it ought to have been given to the deviſee before the eſtate ſhall be determined. 3. If notice be neceſſary: if the infancy of the one party or the other; for as well the leſſor as the deviſee wife of the defendant, were ſo, if that ſhould alter the caſe. And afterwards all the juſtices agreed, and gave judgment for the plaintiff: 1. That the proviſo did not make a condition, but a conditional limitation: and it would not be a reaſonable conſtruction of the intent of the deviſor, that if the feme of the defendant make a breach that it ſhould forfeit the eſtate of the leſſor in remainder, but only a determination of her own eſtate; and for that many caſes were cited. 2. The infancy in this caſe

1 Mod. 86. S.C. by the name of Porter & Fry.

caſe is not material; for the infant took here by purchaſe, and not to have age, and it is a conditional limitation *in fait*, and infants are not privileged againſt conditions *en fait*. *Co. Lit.* 233, *&c.* 3. No notice to be given of the condition, for want of notice ſhall not excuſe in this caſe, as it did in *Corbet*'s caſe, *Co.* 4. 2. becauſe the deviſe here is to a ſtranger, and not to the heir, and the deviſee might as well take notice of the condition as of the eſtate deviſed to her. Otherwiſe it is where the deviſe is to the heir upon ſuch conditional limitation; for the heir might enter upon his general title as heir, without notice of the *will* or condition. Here the defendant had no title, unleſs by the *will*, and yet entered; and this difference was taken and agreed, where a deviſe is to one upon condition, and another is concerned and he is more privy, he that is more privy ſhall give notice to the other; but where both are equally privy and equally concerned, as here the leſſor and defendant are, none of them, is obliged to give notice. 2 *Co. Molineux's caſe, &c.* 2 *Levinz* 21. *Williams* v. *Fry.*

Mich. 24. Car. 2. in B. R. according to 1 Vent. 225. in King & Melling, it was determined an eſtate for life only, by two judges Twiſden & Rainsford againſt Hale, Ch. J. 1 Mod. 100. S. C. 3 Mod. 32.

Deviſe to one for life, and after his death to his iſſue, with power to make a jointure, is an eſtate tail; and tenant in tail, with power to make a jointure ſuffering a common recovery, it deſtroyeth the power. *Levinz Rep.* 2 *part* 58. *King* v. *Melling*

W. B. ſeiſed in fee of tenant right lands in *Weſtmorland* made his *will* in theſe words, *I deviſe to my couſin* W. B. *all my tenant right eſtate at* Brigs-end, *&c.* By this deviſe the fee paſſed, and

and not only the tenant right land for life. 2 *Lev.* 91. *Wilson* v. *Robinson.*

A man devised lands to his wife, that she should dispose of it to which of his infants she pleased: upon the first argument *Vaughan* chief justice, and *Atkins* held, that she might dispose it in fee; *Hugh*, *Wyndham* and *Ellis* the contrary; but it was adjourned *ulterius arguend'*. 2 *Lev.* 104. *Sir Rich. Saltonstall's case.* See 1 Mod. 189. S. C. & 1 Salk. 239. S. P.

Ejectment and special verdict. *Remnant* seised of lands in fee having three daughters, *Susan*, *Anne* and *Elizabeth*, devised to his wife all his lands till his heir should come to 21, paying to his heir ten pounds *per Ann.* and to his other children 20*s.* a-piece. *Item.* he gave to *Ann* and *Elizabeth* 140*l.* a-piece, and if *Susan* his heir died without heirs before 21, so that the land came to *Anne*, then *Anne* to pay to *Elizabeth* the portion she herself should have had; and if any of the younger dughters died without heir before 21, her portion to be divided between his heir and his other daughter. *Per Cur'* upon argument, it was a devise of inheritance to *Susan*, and she shall have the whole exclusive of her sisters by these words in the *will*, calling her his heir, and often in the *will* mentioning his heir in the singular number. But by the words, if *Susan* his heir die without heir before 21, so that the land fall upon *Anne*, then *Anne* do pay to *Elizabeth* the portion which she herself should have had, is no more than an estate tail, and not a fee-simple. 2. *Lev.* 162. *Tilly* v. *Collier.*

A deviſe of lands to a man during his exile, he having relinquiſhed his county upon diſpleaſure of the ſtates againſt him, but not baniſhed, was good till he return. 2 *Lev.* 191. *Paget* v. *Voſcius*.

In ejectment a man having three ſons *A. B.* and *C.* deviſed a part to each ſon without limitation of any eſtate, and if any of them died, his part to remain to the others; one died, and if his part ſhould remain was the queſtion. The reverſion deſcending upon the eldeſt it deſtroyed the contingent remainder to the others, but ſhall be good by executory deviſe. 2 *Lev.* 202. *Forteſcue* v *Abbot*.

A man ſeiſed in fee deviſed to a ſtranger, and his heirs after the death of the deviſor, and his wife, he dieth, and if the ſtranger ſhould take preſently or not, till after the death of the wife, and that ſhe ſhall have it for her life by implication was the queſtion; and adjudged, that the ſtranger ſhould not have it till after the death of the feme as well as of the baron, and that the heir ſhould take it in the mean time. 2 *Lev.* 207, *Smartel* v. *Scholar*.

1 Vent. 334. T. Raym. 330. 2 Vent. 311.

A deviſe to the heirs of *Robert Durdant* yet living, who then had a ſon named *George*, is a good deviſe to *George*, and that the remainder was veſted and executed in *George*, and not contingent and diſtroyed by fine by *Higdon* the truſtee in the life of *Robert*. 2 *Lev.* 232. *James* v. *Richardſon*

2 Mod. 25.

A man ſeiſed in fee of land to the value of 10*l per Ann.* deviſed legacies to ſeveral perſons to be paid out of it to the value of 120*l.* within a year after his death. and after deviſed the

ſame

ſame land without limitation of any eſtate to one under whom the defendant claimed. The deviſee enjoyed lands three years, and paid 30 *l.* of legacies, and after his death the executor ſecured the reſidue, the heir of the deviſor entered and brought an ejectment. By three of the juſtices it is a fee, but not conditional, but in truſt for to pay; and adjudged for the defendant. 2 *Lev.* 249. *Freake* v. *Lee.*

By the conveyances of deviſe and fine to uſes, a rent may be divided without the aſſent or attornment of the party; becauſe his aſſent or attornment is not requiſite for the perfection of theſe conveyances, *Levinz* 2 *part* 240. *Colborn* v. *Wright.*

The caſe of an ejectment and long ſpecial verdict and *Devaſtavit* alledged by an executor and denied by him, was thus; A man poſſeſſed of a long term for years of the manor of *Wimple*, deviſed it to his ſon *John*, and if *John* died unmarried and without iſſue, all to go to his daughters and their executors; and if *John* be married, and have no iſſue living to enjoy it, then after the death of *John*'s wife to the daughters; *John* died without iſſue, and made his ſiſters his executors, and if the ſiſters ſhould have the eſtate by the deviſe of their father, they had not waſted; but if they took as executors to their brother, for whoſe debt they are ſued, they had committed waſte; and upon argument and conſideration it was adjudged, that the remainder of the term to the daughters by the deviſe of the father was void, being a remainder to them upon the death of their brother without iſſue, and therefore they took it as

1 Salk. 224, 225, 230. 1 Lev. 25, 290. 1 Mod. 50, 114. 1 Cha. R. 229. 1 Mod. 52. 1 Sid 37. Cro. Jac. 459, 591. Pal. 333, 336. 1 Jon. 15. 1 Rol. Abr. 612, 613, 835. 2 Rol. Abr. 394. Vaugh. 272. 2 Danv. 523.

executors of the brother; for it is not as the counſel of the daughters would have it, *ſcil.* to be taken without iſſue living at his death, and ſo the contingent to happen within the compaſs of a life; and yet if it was ſo, the court held it to be void, according to *Child* and *Baily*'s caſe, 2 *Cro.* for although that it had prevailed in the caſe of the deviſe of an inheritance, as in *Pell* and *Brown*'s caſe, 2 *Cro.* 590 yet it had not at any time prevailed in the caſe of a term; and the court would not extend a deviſe of chattels to make perpetuities further than it had been before. 3 *Lev.* 22. *Gibbons* v. *Sommers*, 33 *Car.* 2, *in C. B.*

Neſ. Lutw. 249. 250. 1 Mod. 87. 2 Sid. 73. Cart. 170. 2 Lev. 58, 59, 162. 3 Mod. 104, 123. Raym. 425. Hob. 75. 10 Co 78. 1 Co. 175. 1 Lut. 823. 2 Cro. 417, 448, 591. 2 Rol. R. 196. 217. Hut. 85. Lit. R. 6, 320. 347. 2 Sid. 73. 1 Inſt. 20. b. 27 b. Cro. El. 40.

Ejectment and ſpecial verdict, upon which the caſe was; *William Day* ſeiſed in fee, deviſed the land to *William Turner* for his life and to his heirs, and for want of heirs of him to *George Turner* in the ſame manner, and for want of heirs of him to *William Flint* and his heirs for ever. *William* and *George Turner* are dead without iſſue, *William Flint* is dead, and the leſſor is his heir; and *per tout le court* judgment was given for the plaintiff: for *William* and *George Turner* had but eſtates tail, the remainder in fee to *Flint*; for the words, *for want of heirs of him*, are for default of heirs of his body, according to *Berresford*'s caſe 7 *Co.* 41. Alſo it is found in the verdict, that *William Flint* was the next couſin and heir to *William* and *George Turner*, although it be not ſo expreſſed in the *will*, which proves the intent to be heir of the body; for they could not die without heirs living *William Flint* or ſome of his heirs. Wherefore

heirs of the body are neceſſarily to be intended. *3 Lev.* 70. *Parker* v. *Thacker*, *34 Car. 2. Trin. in C. B.*

In ejectment upon *Non Cul.* and ſpecial verdict; tenant in tail made his *will* and deviſed his land, and after by bargain and ſale inrolled conveyed the land to one tenant to the *Præcipe*, againſt whom a common recovery is had, with voucher of the tenant in tail, to the uſe of himſelf in fee; and if by this recovery the *will was* made good, and that the deviſee ſhall have the land by the deviſe by virtue of it, or that it ſhall revoke the *will*, was the queſtion. And by *Pemberton* chief juſtice, and *tout le court*, it was adjudged upon argument a revocation; for by the bargain and ſale, and the recovery, all the eſtate is altered after the *will*. *Levinz 3. part* 108. *Diſter* v. *Diſter*.

1 Rol. Abr. 614, 615, 616
Raym. 240, 335, 295.
1 Sid. 90.
Parl. Caſes 146, 147.
3 Mod. 260.
Goldsb. 93, 109.
Cro. Car. 24.
Dy. 143.
44 Ed. 3, 33.
2 R. 3. b.

Ejectment upon demiſe of *Benjamin Cutter* and *Mary* his wife, and upon *Non Cul.* ſpecial verdict found, that *John Church* was ſeiſed in fee, and by his wife *Iſabel* had iſſue four ſons, *Humphrey*, *Robert*, *Anthony* and *John*, and deviſed all to his wife for life, if ſhe do not marry, but if ſhe do marry, that *Humphrey* preſently after her deceaſe enter, have, hold and enjoy, all the lands to him and the heirs male of his body, the remainder to *Robert* and the heirs male of his body, the remainder in like manner to *Anthony* and *John*, with divers remainders over: and they derived the title from *Humphrey* to the grandſon, and from him to the wife of the leſſor, *Filiam unicam ſuam*, and the title of the defendant as heir male of the body of *Robert* the ſecond ſon; and after argument it was reſolved, that the verdict is imperfect as to the

1 Vent. 199.
2 Lev. 61.
Raym. 236.
Hob. 217.
2 Cro. 571.
4 Co. 61.
Godb. 51.
Gouldſ. 103.
Mo. 543.

plaintiff; for although that the grandson of *Humphrey* had not any other daughter, he might have a son, according to *Gymlet* aud *Sands*'s case, 1 *Cro.* upon which by consent the verdict was amended, and made *unicam Filiam & Hæred. suam.* And then the question was, if any intail was made by the *will*, forasmuch as *Isabel* the wife did not marry; and if no intail was made, then the wife of the lessor had the title as heir general: but it was upon argument resolved, that notwithstanding, the lands were intailed by the *will*; for by all the scope of the *will* it appeared that their was an intail intended by the devisor with divers remainders, and rather than this intent shall be defeated, the words shall be taken thus; *scil.* if she marry, *Humphrey* to enter presently; and if she do not marry, then *Humphrey* shall have, ~~hold~~ and enjoy them to the heir male of his body, with the remainders over. Upon which judgment was given for the defendant. 3 *Lev.* 125. *Luxford* v. *Cheeke*, *Trin.* 35 *Car.* 2 *in C. B.*

Special verdict finds that a man has unicam filiam suam. ill,

1 Sal. 241.
2 Mod. 286.
2 Lev 60, 79.
Plow. 545.
Ow. 125, 148.
Mo 593, 665.
Cro. Car. 161.
Cro El. 313, 840.
1 Co. 105.

Ejectment, and upon trial before *Charlton* justice, for the poverty of the parties, and to prevent the charge of a special verdict, the case was put to have the opinion of the court, and it was such: A man seised of lands on the part of the mother devised them to his executors for payment of his debts for 16 years, and after to one who was his heir on the mother's side; and if he should take them by descent or purchase by the *will* was the question: and *Charlton*, before that the case was put, inclin'd that he should take

take by purchaſe, being the better for him; for then the heir on the part of the father might come to inherit by him before the heir on the part of the mother, and ſo both heirs inheritable; and ſo it was argued at the bar by the counſel on that part: but on the other part it was argued, and ſo reſolved by the three juſtices *Pemberton*, *Windham* and *Levinz*, that the deviſe was void, and he ſhould take by deſcent; and it is no more than if the deviſor had made a leaſe for 16 years, and then deviſed the reverſion to his heir; and the deſcent from him to the heir on the part of the father or mother is but a conſequent depending upon the nature of the eſtate. And it is not like to the caſe where a man having two daughters deviſed the lands to them and their heirs; for that the quality of the eſtate is altered in themſelves, and they are thereby joint-tenants, and ſurvivor ſhall be between them, which had not been if the lands had deſcended to them as coparceners. And judgment was given according to the opinion of the three judges. 3. *Lev.* 127. *Hedger* v. *Rowe*, *Trin.* 35 *Car.* 2. *in C. B.*

Ejectment upon demiſe of *Dorothy Hewly*, heir of *Chriſtopher Hewly*, who being ſeiſed of the lands in queſtion in fee made his *will* in theſe words, *I deviſe to my wife* (now the wife of the defendant) 600 l. *to be paid to* William Weddal, *and is in full payment for the lands I purchaſed of him*, (being the lands in queſtion) *and already ſtated in part of a jointure to my ſaid wife during her life, being of the value of* 67 l. per Ann. *that of* Whiſton, York *and* Malton, *the lands there*

Cro. El. 674. Cro. Car. 476. Hob. 32. 1 Leon. 313. Poph. 183. Mo. 7, 31, 359. 2 And. 123. 3 Leon. 165. 2 Leon. 41. 1 Saund. 180. 1 Lev. 21. 2 Saund. 197. 2 Vent. 363.

amount to 63 l. per Ann. *in all* 130 l. per Ann. *being alſo ſtated on my wife in full of her jointure.* The lands in *Wigginton* (being the lands in queſtion) were not ſettled upon the wife; and if they ſhould paſs by the *will* to her for life was the queſtion. And reſolved by *Pollexfen* chief juſtice, *Rookesby* and *Ventris* juſtices, that they paſs not by the *will.* Here are no words of deviſe to paſs them, nor no intent that ſhe ſhould have them by the *will*, but a miſtake that he had ſettled them before; and therefore they did not paſs by implication, as in the caſe of *H.* 7. where a man deviſed lands to his heir after the death of his wife, the wife ſhould have them in the mean time, for the lands are deviſed and to the heir, but not till after the death of his wife; and becauſe that the heir is not to have them till after the death of the wife, the wife ſhould have them in the mean time by implication: but here the lands are not deviſed at all, but he declares, that they are already ſettled upon the wife, in which he is miſtaken, and it ſhall not turn to a deviſe to the wife by implication. But *Howell* juſtice *contra*; here it appeareth an intent that the wife ſhall have them; and although that he be miſtaken in the way that ſhe ſhould take them by the ſettlement, ſhe ſhall take them by ſuch a way as ſhe may; *ſcil.* by the *will*, rather than his intent ſhall be fruſtrated: but by the opinion of the other three juſtices judgment was given for the plaintiff. 3 *Lev*, 259. *Wright* v. *Wyvel.* 2 *Vent.* 56. *ſame caſe. Trin.* 1 *W. & M. in C. B.*

Where

Where the plaintiff ſaith, that he was poſſeſſed by virtue of the *will* of the term for 1000 years, where the deviſe is to him for life only, the remainder to his ſon, and the heirs male of his body, it is good *per Cur'*. For the remainder to his ſon is but contingent if any remainder of the term ſhall be; for every eſtate for life is, in ſuppoſition of law, of greater continuance than any eſtate for years; and therefore the whole term is in the father during his life, and the remainder to his ſon is but a poſſibility. 3. *Lev.* 264. *Douſe* v. *Earle*, 1 *W. & M. Mich. in C. B. in covenant.* C.o. Jac. 590. Bridg. 1, 3. Styl. 271. Win. 55. Hut. 60. 1 Jo. 17.

In ejectment tried at *Kent* aſſizes, upon the evidence, the caſe was ſuch before *Treby* chief juſtice, and was agreed to be made a caſe by the opinion of the court. *Allen* by his *will* deviſed the lands in queſtion in theſe words; *I give and bequeath to my ſons* Richard *and* Robert, *and their heirs for ever, and the longer liver of them, to be equally divided between them after my wife's death, all that my meſſuage*, &c. The wife died, and *Robert* deviſed his part to the leſſor and died; and the ſole queſtion was, if *Richard* and *Robert* were joint-tenants or tenants in common of the inheritance; and after divers arguments, it was adjudged by *Treby*, *Nevil* and *Rookesby*, to be a tenancy in common, *Powel* being of a contrary opinion. 3 *Lev.* 373. *Bliſſet* v. *Cranwell & alios*, *Paſ.* 6 *W. & M. in C. B.* Mo. 350, 594. Cro. El. 330. 347, 443, 695. Mo. 558. Cro. Car. 75. 1 And. 194. 1 Bulſt. 113. Lit. R. 46. 3 Leon. 19. Hetl. 29. 3 Co. 39. b. Goldſ. 182, 185. 3 Mod. 209. 1 Chan. R. 64. Lex Teſtam. 504. Plow. Com. 541. Ow. 148. Co. Lit. 122. Yelv. 209, 210.

A deviſe to *A* for life, without impeachment of waſte, and if he have iſſue male, to the iſſue male and his heirs; and in caſe *A.* die without iſſue to *B.* and his heirs. *A.* hath an eſtate for life

Salk. 224. only. 3 *Lev.* 432. *Loddington* v. *Kime*, *Trin.* 7 *W.* 3. *in C. B.*

Deviſe of the land after his debts paid, he afterwards contracts other debts, the land ſhall revert upon payment of the firſt debts. 3 *Lev.* 433. *Loddington* v. *Kime.*

A man made two executors, of whom one made his executor and died, and afterwards the ſurviving executor died inteſtate: a legatee ſued the executor of the executor, who firſt died, in the eccleſiaſtical court for his legacy, who pleaded this matter; which plea they refuſed, upon which he prayed a prohibition, and it was denied; for the matter is teſtamentary, and perhaps the executor of the executor hath all the goods in his hands, and is executor of his own wrong. And no other in the caſe to be ſued for recovery of the legacy; and although that the ſurvivor ſhall have all by our law, it is not ſo perhaps in theirs; and the matter belonged to their law, and if they proceed ill he ought to appeal, but they ſhall not be prohibited by this court; and the prohibition was denied. 1 *Lev.* 164. *Gullan* v. *Gill.*

Aſſumpſit, and declared, that one *J. S.* deviſed a legacy to the plaintiff, and made the defendant executor, and the plaintiff intending to ſue him for it; he in conſideration of forbearance, promiſed the plaintiff to pay him; the defendant pleaded ſeveral bonds and judgments, and that he had not aſſets *ultra*. Whereupon the plaintiff demurred, and had judgment without argument; for the aſſets is not material, if he had any or none, being charged upon his own pro-

promiſe in conſideration of forbearance, and forbearance of ſuit for a legacy is ſufficient conſideration. 2 *Lev.* 3. *Davis* v. *Reyner.*

A man deviſed goods to *A.* and *B.* the executor aſſented to the legacy, and then *A.* died; the executor of *A.* ſued in the eccleſiaſtical court for the part of *A.* for by the eccleſiaſtical law there is no ſurvivor in ſuch caſe. *B.* ſued for a prohibition and declared, and upon demurrer and argument adjudged, that the prohibition ſhould ſtand; for by the aſſent of the executor the intereſt is veſted and become a chattel, and governable by the common law. 2 *Lev.* 209. *Buſtard* v. *Stukely.*

The ſpiritual court have the probate of *wills*, but a feme covert cannot make a *will*; if ſhe diſpoſeth of any thing by her huſband's conſent, the property of what ſhe ſo diſpoſeth paſſeth from him to her legatee, and it is the gift of the huſband: if the goods were given into another's hands in truſt for the wife, ſtill her *will* is but a declaration of the truſt, and not a *will* properly ſo called. But of things in action, and things that a feme covert hath as executrix, ſhe may make a *will* by her huſband's conſent: and ſuch a *will* being properly a *will* in law, ought to be proved in the ſpiritual court. *Mod. Rep.* 212. *Anonymus.*

In an action upon the caſe the plaintiff declares, that upon communication of a marriage to be had between the inteſtate's daughter and the defendant's ſon, it was agreed, that the inteſtate

teſtate ſhould give the ſon 50 *l.* with his daughter, and that if the daughter ſurvived the ſon, the defendant ſhould pay her 100 *l.* after his death, and mutual promiſes were made between the inteſtate and defendant to perform the agreement; and ſhews that the marriage was had, and that the inteſtate paid the 50 *l.* and died, and that the ſon died, and aſſigns breach in the defendant's non-payment *in retardat' adminiſtrat'*, *&c.* and upon *Non Aſſumpſit* it was found for the plaintiff. *Al. Rep.* 1. *Baſield adminiſtratrix* v. *Collard.*

In an *Eject' firmæ* upon a trial at the bar the evidence was, that one *Warner* by his *will* in writing deviſed the lands in queſtion to *Henry Etheringham*, and the heirs male of his body, and bailed the writing to a certain perſon to keep, and four years after died; and about a fortnight after his death this writing was found gnawn all to pieces with rats; yet he, with the help of the pieces, and of his memory and other witneſſes, cauſed it to be proved in the eccleſiaſtical court; and the court demanded of the witneſſes, whether a ſtranger, that knew not the contents of the *will* before, by joining of the pieces together could tell that the deviſe of the lands in queſtion was to *Etheringham*, and the heirs male of his body; for they did agree, that if this clauſe could be made out, though by joining of the pieces, it were a good *will*. But the witneſſes ſaid, a ſtranger could not make out that clauſe. Whereupon the court directed the jury, that if they found that the *will* was gnawn before the death of

of the deviſor, then 'twas for the plaintiff; if after, for the defendant. *Select Caſes* 2. *Etheringham* v. *Etheringham*.

In *Eject' firm'* upon a ſpecial verdict the caſe was, That one being ſeiſed of the manor of *D.* and other lands in *Somerſetſhire*, by his *will* in writing deviſed the manor to *A.* for ſix years, and part of the other lands to *B.* in fee; and then comes in this clauſe, *And the reſt of all my lands in* Somerſetſhire, *or elſewhere, I give to my brother, and the heirs of his body.* And the queſtion was, whether the reverſion of the manor paſſed or no; for it was ſaid, that the word reſt, did extend only to ſuch lands as were not deviſed before; but it was adjudged for the defendant, that the reverſion of the manor paſſed by the deviſe. *Al. Rep.* 28. *Wheeler* v. *Walroone*. 2 Vent. 286. 3 Mod. 328.

Before *Jones* and *Dolbin*, juſtices of the king's bench, and others, commiſſioners delegate, the caſe was, *Mary Shore* made her teſtament, and of it named *Eliz. Wheeler* her executrix, and gave the reſidue of her goods to the diſpoſal of her executrix, and Sir *John Shore*, her brother, and died. Dame *Wheeler* not having proved the teſtament made her own teſtament, and of it made *Eliz. Tayler* executrix; after the death of Dame *Wheeler* adminiſtration of the goods of *Mary Shore cum teſtamento annexo* was committed to Sir *John Shore*, who by his teſtament made his wife his executrix, and died, and afterwards adminiſtration *de bonis non, &c.* of *Mary Shore*, was committed to the Lady *Shore*, wife

wife and executrix of Sir *John*; and the ſaid *Eliz. Tayler*, having prayed adminiſtration to be granted to her, it being denied, ſhe appealed to the delegates; and at firſt it was agreed, that the bequeſt of the reſidue by the words aforeſaid, was a bequeſt of the intereſt, and not an authority only. Secondly, That this intereſt was not a moiety of the reſidue, nor did grow by ſurvivorſhip to Sir *John Shore* in the caſe of a legacy as it ſhould in a gift of goods at the common law. Thirdly, it was reſolved, that though adminiſtration might be granted to the appellant and appellee together, yet there was no cauſe of appeal, and the grant by the judge of the adminiſtration was confirmed, and the appellant condemned in 10*l.* coſts. *Sir Thomas Jones* 161. *Elizabeth Tayler, appellant*, v. *Dame Shore, devant commiſſioners delegate.*

Action in the *Debet & Detinet* was brought for rent, although the plaintiff entitled himſelf (as executor) to the reverſion of the term to which the rent was incident. *Sir Thomas Jones* 169. *Trattle* v. *King.*

In a *will*, if there be a condition, and after that a limitation, the condition muſt be limited accordingly. *Calthrop* 3. *Davies* v. *Kemp.*

Lands deviſed to two ſons and their heirs, one dies in the life of the deviſor. The deviſor dies without new publication, the ſurvivor ſhall have all: if both had died, then the heirs could not have taken. *Calthrop* 3, 4, 5. *Davies* v. *Kemp. Mich.* 16 *Car.* 2.

One

One makes *A.* and *B.* his executors, and *wills*, that *A.* and *B.* ſhall have and hold the iſſues and profits of his lands, until his heir ſhall attain his age of 21 years, to the intent that the executors with the profits of this ſhall pay his debts, and for the education of his children; adjudged, that it was an intereſt in the executors: had it been only that he ſhould have the over-ſight and doing of all his lands and moveable goods, then it had been otherwiſe; as in *Yelv. p.* 73. *Carpenter* v. *Collins.* So in *Dyer fo.* 26. *pl.* 17. the diſpoſing, ſetting, letting and ordering of his lands for the government and ordering of his children. It is no intereſt to ſell the land. *Vide Cro. El. p.* 678. *Piggot and Garniſh*, *Calthrop* 26. *Courthope* v. *Hayman.*

A rent is deviſed to one (*de Novo*) and to the heirs male of his body; and for default of ſuch iſſue, to another and the heirs male of his body; and for default of ſuch iſſue, to another and the heirs male of his body; the firſt deviſee having no heirs male ſuffers a common recovery. This recovery is good, and ſo the avowry is good. *Calthrop* 52. *Smith* v. *Farnaby.*

If I deviſe a rent to a man, and the heirs of his body, and then deviſe it to another to begin after that, this is an executory deviſe, and not a remainder, and cannot be cut off by a common recovery. *Calthrop* 53. *Smith* v. *Farnaby.*

Cuſtom of having an heriot, whether the deceaſed had goods or not, a void cuſtom. *Calthrop* 86. *Smith* v. *Paynton.*

William

William Bezar the teſtator had four ſons, *John*, *Robert*, *William* and *Matthew*, and deviſed the lands in queſtion to *John* for life, under the conditions and limitations in his *will*, and after his deceaſe to the uſe of the heirs of his body. This, though it be limited to him for life, is nevertheleſs an eſtate tail to him, as well in a *will* as any other conveyance. The eſtates cannot ſtand together, but the eſtate for life is ſwallowed up in the tail; and the ſame rule holds where an eſtate of freehold is limited to a man for life, the remainder to the heirs of his body, it is an eſtate tail in a deviſe as well as in a deed. *Calthrop* 171. *Rundale* v. *Eley and others.*

A man deviſeth *Blackacre* to *A.* in fee, and after by the ſame *will* deviſed a third part to *B.* for life, or in tail; this laſt deviſe to *B.* doth not make void all to *A.* but *B.* ſhall have an eſtate in poſſeſſion, *A.* in remainder. *Calthrop* 174.

J. T. ſeiſed of houſe and lands makes his *will*, and gives it to his ſon *Robert*, upon condition that he pay his two ſiſters 5*l. per Ann.* to each by four quarterly payments; the firſt payment to begin at ſuch feaſt as ſhall firſt happen after his and his wife's deceaſe. Afterwards he gives 50*s.* out of the rents. ——— ſerjeant. There is a diverſity where the money to be paid is a ſum in groſs, whether it is entire on the land or not, or whether it be to be paid *in præſenti* or *futuro*; if ſo, this ſhall advance the eſtate in fee: but if an annual rent or ſum be to be paid out of the profits, this makes no larger eſtate than

than the words will bear.— *Siſe* ſerjeant *contra*: Paying generally makes a fee, paying yearly out of the profits alters the caſe. If it be given ſo to any one that is not heir at law, it is a condition: I conceive it is a rent-charge upon the land. Take it upon the reaſon of *Colyer*'s caſe. If here be a poſſibility that *Robert* ſhall loſe by what he pays under that compulſary condition, *Robert* is at his peril to pay the quarterly payment. *Vaughan* chief juſtice: Two things are to be conſidered. 1. For the benefit of the deviſees. 2. For the benefit of the legatees; he did intend this land particularly to be charged with theſe legacies. The entry of the heirs is not always intended by the way of a condition: but ſometimes it ſhall be look'd upon as an executory deviſe, or as a limitation. I give land to *A.* on condition he ſhall pay *B.* 10*l.* if he do not, *B.* ſhall enter. This is no advantage to the heir to enter. *Ellis* juſtice: In ſome caſes paying ſhall not make a fee. If it be apparent there is a loſs or peril, a fee paſſeth. *Calthrop* 226. *Thacker's caſe.*

In a clauſe of the *will* the words are, *I will and bequeath* (the lands in queſtion) *to my wife during her natural life, and after by her to be diſpoſed to ſuch of my children as ſhe ſhall think fit.* The queſtion is, what eſtate the wife hath? A deviſe to another to diſpoſe as he ſhall think fit, or at his diſcretion, is an eſtate in fee. *Vaughan* chief juſtice: I agree the caſes: I know no difference between deviſing land to be diſpoſed of by him, and to be diſpoſed at his will and pleaſure. But here I hold the wife hath no eſtate in fee,

fee, ſhe hath only an eſtate for life; but there is a power in her to ſpecify an eſtate to another: as I covenant to demiſe land to ſuch perſons for as many years as *I. S.* ſhall diſpoſe it to; now here is nothing by way of gift, but a power of ſpecification; and therefore the word *Diſpoſe* carries no fee. This word *Diſpoſe* cannot ſignify *Give*; for none can diſpoſe of more than he hath, and there is an eſtate for life only to the wife. Let us turn the words equivalently; *I will and bequeath the lands in queſtion at my wife's diſpoſe, to ſuch of my children as ſhe ſhall think fit.* Now this way the children do take it expreſly by the gift of the teſtator, and the words (at her diſpoſe) are with relation to the children, and not to the eſtate; and when ſhe hath diſpoſed of it to any child, that child ſhall have but an eſtate for life; ſhe hath the nomination or ſpecification: but my brothers are againſt my opinion. *Et il dit ſubiraſcens, Sententiæ numerantur, non ponderantur.* Calthrop 232. Anonymus.

And laſtly, having ſupplied what I have thought neceſſary to make a work of this nature complete, and in all its parts conformable to the preſent time, and laws now in force; future times may produce occaſions for future additions: but, as perfect to this time, I may at preſent put thereto.

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